TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1916

No. [redacted] 148

GRATIOT COUNTY STATE BANK, PETITIONER,

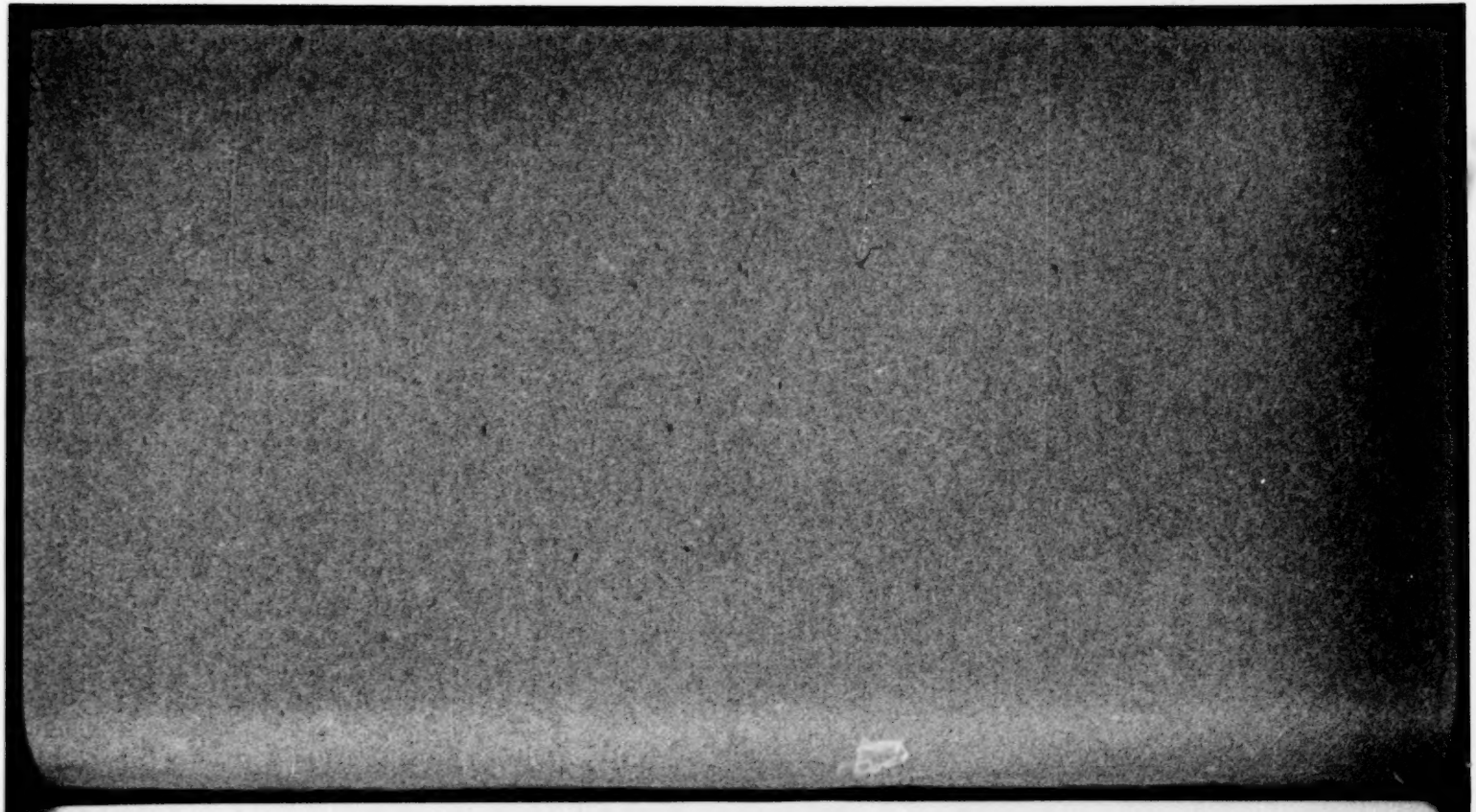
vs.

D. LLOYD JOHNSON, AS TRUSTEE OF THE ST. LOUIS CHEMICAL COMPANY, BANKRUPT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED MARCH 9, 1917.

(26,815)



(25,815)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 985.

GRATIOT COUNTY STATE BANK, PETITIONER,

vs.

D. LLOYD JOHNSON, AS TRUSTEE OF THE ST. LOUIS CHEMICAL COMPANY, BANKRUPT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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0 STATE OF MICHIGAN:

Supreme Court.

No. —.

D. LLOYD JOHNSON, as Trustee of the St. Louis Chemical Company, Bankrupt, Plaintiff and Appellee,

VS.

GRATIOT COUNTY STATE BANK, a Corporation, Defendant and Appellant.

Error to the Circuit Court for the County of Gratiot.

Hon. Kelly S. Searl, Circuit Judge.

RECORD.

George P. Stone, C. W. Giddings, and L. B. McArthur, Attorneys for Defendant and Appellant.
Lyon & Moinet and William A. Bahlke, Attorneys for Plaintiff and Appellee.

1 STATE OF MICHIGAN:

Supreme Court.

RECORD.

Plaintiff's Declaration.

(Filed Aug. 2d, 1912.)

STATE OF MICHIGAN,
County of Gratiot, ss:

The Circuit Court for the County of Gratiot.

D. Lloyd Johnson as trustee of the St. Louis Chemical Company, bankrupt, plaintiff herein, by Lyon & Moinet, his attorneys, William A. Bahlke, of counsel, complains of the Gratiot County State Bank, a corporation organized and existing under the laws of the State of Michigan, defendant herein, of a plea of trespass on the case upon promises, filing this declaration with rule to plead endorsed thereon as commencement of suit, pursuant to the statute authorizing the commencement of suits by declaration.

For that whereas, heretofore and on, to wit: April 26th, 1911, said

St. Louis Chemical Company was and had been for a long
2 time, to wit: one year and upwards immediately prior thereto, a corporation duly organized and existing under the laws of the State of Michigan, and on, to wit: said date, was duly adjudged a bankrupt in and by the United States District Court for the Eastern District of Michigan, Northern Division, in Bankruptcy, and afterwards and on, to wit: June 22nd, 1911, at a meeting of the creditors of said bankrupt, duly called and held, the said D. Lloyd Johnson was duly appointed and chosen trustee of said St. Louis Chemical Company, a bankrupt, and afterwards and on or about June 27th, 1911, duly accepted said trust and qualified and entered upon the performance of his duties as such trustee, and since said time has been and is now occupying the position of and acting as trustee of said bankrupt;

And whereas, also, said Gratiot County State Bank has been for, to wit: two years last past and upwards and is now a corporation duly organized and existing under the laws of the State of Michigan and doing business as such and in said name, at, to wit: the City of St. Louis, in said County of Gratiot, and elsewhere in the said State of Michigan, and the plaintiff avers that on, to wit: June 27th, 1911, upon notice being duly and legally given to the creditors of said bankrupt, claims were duly filed, proven and allowed against said bankrupt to the amount of upwards of twenty thousand dollars, no part of which has been paid, and the said plaintiff has not sufficient assets in his hands as such trustee, nor can he find sufficient assets to pay any dividends upon the said claims; and the plaintiff further avers that on, to wit: February 26th, 1909, which was within four months of the date of the filing of the petition upon which said St. Louis Chemical Company was adjudged a bankrupt, as aforesaid, said St. Louis Chemical Company was indebted to said Gratiot County State Bank in the sum of five thousand dollars and upwards
3 and thereafter made payments upon such indebtedness by check, draft, cash or otherwise upon the following dates and in the following amounts, to wit: February 26, 1909, $700; March 4, 1909, $200; March 6, 1909, $200; March 12, 1909, $700; March 13, 1909, $500; March 15, 1909, $400; March 20, 1909, $200; March 23, 1909, $900; March 24, 1909, $100; March 31, 1909, $400; making the total payments of $4,300 upon said indebtedness within four months prior to the time of the filing of said petition; which said moneys, so paid, as aforesaid, were received and accepted by said defendant. And the plaintiff further avers that at and prior to the time of such payments said St. Louis Chemical Company was insolvent within the terms and meaning of the provisions of the bankruptcy act of 1898 and the amendments thereto, and said defendant and its agent or agents acting therein had knowledge and notice thereof, and also then and there prior to and at the time of said several payments had reasonable cause to believe that it was intended by said payments to give a preference to said defendant. And the plaintiff further avers that the effect of the enforcement of such payments and transfers would and will be to enable the said defendant to obtain a greater percentage of its said debt against said bankrupt

than others of said creditors of the same class and that said defendant then and there had notice and knowledge thereof. And the plaintiff further avers that said transfers were made with the intent and purpose on the part of said bankrupt to hinder, delay and defraud its creditors or some of them, and that said defendant was not then and there a purchaser in good faith and for a valuable consideration of the property and moneys of said bankrupt so transferred by said bankrupt and received as aforesaid by said defendant.

And whereas, also, the defendant heretofore, to wit: on the
4 1st day of April, 1912, was indebted to the plaintiff in the sum of ten thousand dollars for money then and there lent by the plaintiff to the defendant, at its request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendant, at its request.

And in a like sum for money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendant to the plaintiff on an account stated between them.

And thereupon the said defendant afterwards and on the day and year last aforesaid, in consideration of the premises, respectively, then and there promised the plaintiff to pay him the said several sums of money, respectively, on request; yet, the said defendant has disregarded its said promises and has not, although often requested so to do, paid any of the said sums of money or any part thereof; all to the damage of the plaintiff of ten thousand dollars, and therefore he brings suit.

LYON & MOINET,
Attorneys for Plaintiff.

Business Address: St. Johns, Mich.

WM. A. BAHLKE,
Of Counsel.

Rule to Plead.

On filing the foregoing declaration in this cause pursuant to the statute authorizing the commencement of suits by declaration and on motion of Lyon & Moinet, attorneys for the plaintiff, William A. Bahlke, of counsel,

It is ordered, that the defendant in said cause appear and plead to said declaration within fifteen days after service upon it
5 of a copy thereof and of this rule and notice of this rule or judgment, etc.

LYON & MOINET,
Attorneys for Plaintiff.

WM. A. BAHLKE,
Of Counsel.

(Endorsed on back as follows:) The Circuit Court for the County of Gratiot. D. Lloyd Johnson as Receiver, &c., v. Gratiot County State Bank a corporation &c. Narr. and Rule to Plead.

To the within named defendant:

Take Notice, that on filing in the office of the Clerk of said court, as commencement of suit, a declaration in this cause, of which the within is a true copy, a rule to plead was endorsed thereon and filed therewith, requiring you to appear and plead to said declaration within fifteen days after service on you of a copy thereof and of said rule and notice of said rule, or judgment, etc.

August 2, 1912.

Yours, etc.,

LYON & MOINET,
Attorneys for Plaintiff.

WM. A. BAHLKE,
Of Counsel.

6 *Demand for Bill of Particulars.*

(Filed Aug. 14th, 1912.)

STATE OF MICHIGAN:

The Circuit Court for the County of Gratiot.

D. LLOYD JOHNSON, as Trustee of the St. Louis Chemical Company, Bankrupt, Plaintiff,

vs.

GRATIOT COUNTY STATE BANK, a Corporation, Defendant.

SIR: Please take notice that a bill of particulars of plaintiff's demand in the above cause is hereby demanded.

Yours, etc.,

C. W. GIDDINGS,
Attorney for Defendant.

Business Address: St. Louis, Mich.

GEO. P. STONE,
Ithica, Mich., of Counsel for Defendant.

To Lyon & Moinet, Attorneys for Plaintiff.

7 *Bill of Particulars.*

(Filed Aug. 18, 1912.)

STATE OF MICHIGAN:

The Circuit Court for the County of Gratiot.

D. LLOYD JOHNSON, as Trustee of the St. Louis Chemical Company, Bankrupt,

vs.

GRATIOT COUNTY STATE BANK, a Corporation.

The Circuit Court for the County of Gratiot.

SIRS: You will please to take notice, that the following is a bill of particulars of the plaintiff's demand in this cause and for the recovery of which this action is brought, to wit:

Payments made by said St. Louis Chemical Company upon an indebtedness then and there owing by it to said defendant, by check, draft, cash or otherwise, upon or about the following dates and in the following amounts, which said payments are claimed by plaintiff to have been made within four months of the date of the filing of the petition upon which said St. Louis Chemical Company was adjudged a bankrupt, as follows:

February 26, 1909, $700; March 4, 1909, $200; March 6, 1909, $200; March 12, 1909, $700; March 13, 1909, $500; March 15, 1909, $400; March 20, 1909, $200; March 23, 1909, $900; March 24, 1909, $100; March 31, 1909, $400; making the total payments of $4,300 upon such indebtedness within four months prior to the time of the filing of said petition.

8 Interest on all of said payments at the rate of five per cent per annum from the time of the receipt thereof, respectively, by said defendant, to the date of recovery herein.

It is believed that the foregoing statement of dates and amounts is substantially correct, but it may vary a little as to some of the exact amounts, but the action is brought to recover the $4,300 (and interest thereon) received by said defendant from said St. Louis Chemical Company within four months prior to the date of filing said petition.

And plaintiff also claims to recover any and all other payments, if any, made as aforesaid, by said St. Louis Chemical Company to said defendant within said time. Plaintiff has not at present sufficient knowledge to make more specific statement in this respect,

but if any such payments were so made they must and will appear upon the records of said defendant.

Dated August 17, 1912.

To C. W. Giddings, Esq., Attorney for defendant. Geo. P. Stone, of counsel.

Yours, etc.,

LYON & MOINET,
Attorneys for Plaintiff.

WM. A. BAHLKE,
Of Counsel.

9 *Defendant's Plea.*

(Filed Aug. 26, 1912.)

STATE OF MICHIGAN:

The Circuit Court for the County of Gratiot.

D. LLOYD JOHNSON, as Trustee of the St. Louis Chemical Company, Bankrupt, Plaintiff,

vs.

GRATIOT COUNTY STATE BANK, a Corporation, Defendant.

The defendant comes and demands a trial of the matters set forth in the plaintiff's declaration.

C. W. GIDDINGS,
Attorney for Defendant.

Business Address: St. Louis, Mich.

GEO. P. STONE,
Ithaca, Mich., of Counsel for Defendant.

10 *Bill of Exceptions.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Gratiot.

D. LLOYD JOHNSON, as Trustee, etc., Plaintiff,

vs.

GRATIOT COUNTY STATE BANK, Defendant.

Before Hon. Kelly S. Searl, Circuit Judge, and a Jury, February 17th, 1914.

Appearances: Messrs. Lyon & Moinet, and William A. Bahlke, for plaintiff; Hon. George P. Stone, C. W. Giddings and Mr. McArthur, for defendant.

Jury sworn.

Opening statement by Mr. Lyon.

A bunch of papers was here marked Exhibit A.

Mr. Lyon: From Exhibit A, which are the files from the office of the Referee in Bankruptcy, I offer in evidence the petition, creditors' petition, together with the filing showing that it was filed June 25th, 1909.

Mr. McArthur: It appears that this petition in bankruptcy has been made by William A. Bahlke as attorney for two of the creditors and by one of the creditors himself. The petition, like all other petitions, contains a large number of allegations, some of which are true and some of which are not true, some of which are material to this case and some of which are not material. If the substance and contents of that petition goes to the jury and is to be considered by the jury in this case, it will be very prejudicial to the defendant's case in the trial now before this court. We want to object to the
11 introduction of the petition as being entirely incompetent, irrelevant and immaterial and as being prejudicial to be read before the jury in this case. The only purpose of the introduction o the petition is to establish the date upon which the petition is filed and we have no objection to their showing from the files when this petition in bankruptcy was filed; in fact that date will be conceded.

The Court: I think it was properly offered in evidence. As to how much I will permit to be read to the jury will be another question to determine.

Recess until 2 o'clock.

Afternoon's Proceedings of February 17th, 1914.

A paper was here marked Exhibit B.

A bundle of papers was here marked Exhibit C.

Mr. Lyon: I have had marked a certain bundle of papers Exhibit A; a certain certified copy of the bankruptcy docket, Exhibit B; and a certain bundle of papers Exhibit C, and ask counsel to concede that these are the original files and certificates of docket entries from the bankruptcy court, Northern Division of the Eastern District of Michigan. They are not all of the files, Judge. Here are some more that I have not had marked.

Order of adjudication was here marked Exhibit D.

Subpœna was here marked Exhibit E.

Mr. Stone: I will make no objection to these papers that have been offered.

Mr. Lyon: No, they are not offered yet. I am asking you to concede what they purport to be.

Mr. Stone: We will make no objection because of the fact that Mr. Marston, the present referee in bankruptcy is not here
12 for the purpose of identifying them and we raise no objection because of their lack of authenticity.

The Court: You don't raise any question but what they are the identical papers from that office?

Mr. Stone: No, we concede that this is a part of the files and records of Mr. Marston's office in the same manner that he would testify if he was here; that they are a part of the files and records of his office but we reserve of course the right to make the same objections to these papers that we would if he was here upon the witness stand.

The Court: Oh, yes.

Mr. Lyon: Now with that concession, if the court please, I offer to read in evidence the petition in bankruptcy which was admitted in evidence before the adjournment. Upon the question as to how much ought to be read, I will call the court's attention to the fact that in my opening I stated that the plaintiff in the case claims to recover upon two different grounds, under two different sections of the statute, 60 A. and B. being one, and 67 E. being the other. So far as the petition contains certain allegations and the answer meets it and sets up facts, it is competent and the whole or both of them are competent as binding the Chemical Company itself.

Mr. McArthur: We want to object to the reading in evidence of this petition in bankruptcy before the jury for the reasons stated in the objection that was made this morning, and for the further reason that there is nothing in the declaration of the plaintiff in this case that in any way declares upon or calls attention to this petition. I would like to know what purpose it can be read to the jury for.

Mr. Lyon: We purpose to show among other things by the petition that that petition distinctly charged that the Chemical
13 Company was insolvent during the entire four months preceding the date of filing the petition; that in addition to that it alleged certain specific acts of bankruptcy during that four months; I propose to follow it up by the answer showing just what the company said in reference to that to show that an issue was framed upon the question and follow it up by the report of the referee confirmed by the Federal Court and finding that this corporation was insolvent during this entire four months and that it committed these specific acts of bankruptcy. Beyond any question it is absolutely res adjudicata as against this company.

Mr. Stone: In addition to what Mr. McArthur has said, it seems to me that this view is a rational one. Now if this proceeding as shown by the petition, as shown by the proceedings and the report and the decree and adjudication of bankruptcy if that is conclusive and stare decisis upon some of the matters therein stated, then as to all those matters, this jury would have nothing to do with it; it would be a matter for the court entirely. The jury would have nothing to do with it. Now if these matters are matters that you are going to submit to the jury for them to decide upon issues, then the reading of these affidavits or petitions and these reports covering the facts that you must submit to the jury cannot help but be prejudicial. Your honor cannot strike it out in such a way as to relieve the defendant from the prejudice caused by its being introduced. Your honor well knows that during a week of trial here, as it may be that we will have to have, that it would be utterly impossible for the jury to determine what they heard from the witness

stand and what my brother Lyon might read to them. I apprehend the only real reason for reading it and I think I am justified in making the remark, is that it may be prejudicial.

Mr. Lyon: An exception.

The Court: Do you find any authorities upon it, gentlemen? Hasn't this question been passed upon somewhere?

Mr. Lyon: We went all over that ground in the Tuger case and I presented the authorities and this court held it was competent and proper to be admitted.

The Court: I know I did, and I wondered whether or not since that time the attorneys upon the other side hadn't found anything to the contrary. Without passing on the question of whether you are or are not bound, I think, if there is no authorities to the contrary, that I will rule the same as I did in the other case that this testimony is proper to go in, but it does not follow that because these papers are read upon the record—they are part of a public office here; I suppose Mr. Lyon desires to make them part of the record in order to show what was adjudicated there—it does not follow therefore because they are read in the presence of the jury that therefore they are affirmative evidence of what they contain, that is, of the facts that the recitals are about. That is a question I will have to determine later on. It is not an uncommon thing at all for us to receive testimony here which has to be limited to the jury; we do it in every case we try. We have a paper often read to the jury with instructions to the jury that it is not proof of the facts contained therein.

Mr. McArthur: Do I understand that the court does instruct the jury that they are not to consider the facts stated therein?

The Court: I haven't yet. I don't know what the facts are in the paper.

Mr. Stone: If he wants to read that upon the record, we ask to have the jury excused while he does it.

Mr. Lyon: I object to it. So far as this bankrupt is concerned, I submit we have a right to get to this jury the question of the allegations in the petition coupled with the admissions of the defendant under oath in the answer as bearing upon its intention.

Mr. McArthur: I object to him stating what the Chemical Company has admitted in its answer as prejudicial to the defendant in this case.

The Court: If I knew at this time that I would eventually exclude this all from the jury, I would excuse them. I have not determined yet how much of this the jury may consider and how much they may not.

Mr. McArthur: Then we ask that the court determine it before it goes in.

The Court: The court very seldom crosses a bridge before he gets to it.

Mr. Giddings: We object to the reading of this petition for the reason that it is incompetent and irrelevant for the reasons already stated, that it cannot tend to prove anything under the pleadings

in this case. If it is necessary under the holding of the court to prove that a petition was filed, than an order of reference was made, that a finding was made by the referee and then an adjudication made, that I think would be competent but it is not necessary to read all these matters to the jury. We are not concluded by the findings of the referee in this case, and this is not competent evidence.

The Court: Let the record show that the court, not having decided yet how much of this may or may not be submitted to the jury, is unable to comply with the request of counsel for the defendant and excuse the jury but will receive the evidence with the caution to the jury, and the jury will listen to what I say now, that you must not take the recitals contained in these papers as true or as any evidence of the facts therein recited, unless the court
16 shall hereafter instruct you in that regard. Proceed.

Mr. Stone: An exception.

(Mr. Lyon reads petition in bankruptcy case.)

Mr. Giddings: I object to the reading of any portion of the petition making reference to the Gratiot County State Bank for the reason that it is incompetent because it is not mentioned or taken into consideration by the report of the referee in this case.

The Court: The same ruling as before and the same caution to the jury. Proceed.

Mr. Giddings: An exception.

Mr. Lyon: I next offer in evidence from Exhibit A, the certificate of the deputy clerk made and filed upon June 30th, 1909, showing the absence of the Judge from the Northern Division of the District, the statute providing that if the Judge does not appear within three or four days, that the clerk shall make a certificate and refer it to the referee. That is a certificate entitled in the cause, made by Isabell A. Ballou, deputy clerk of said court in and for the Northern Division.

(Mr. Lyon reads certificate of Judge's absence.)

Mr. Lyon: Number 121. Endorsed, Certificate of Judge's absence. Filed June 30th, 1909. Lee E. Joslyn, Referee.

I offer in evidence Exhibit E, which is a subpœna in the cause referred to, bearing date June 25th, 1909, returnable before the court at Bay City on the 8th day of July, 1909. Signed, Carrie Davidson, by Isabel A. Ballou, Deputy Clerk, and seal of the court attached, together with the return showing that service of the subpœna was made upon the St. Louis Chemical Company by service upon David E. Harrison, vice-president, on July 2nd, 1909.

17 Mr. Stone: We object to that for the reason that counsel has suppressed whom the subpœna issued to.

My Lyon: I said it was issued in the cause. I assumed, this being merely for the court, to show jurisdiction, I assumed the court would take judicial notice it was addressed to the St. Louis Chemical Company. I resent the imputation. I am not trying to suppress things. It is addressed to the St. Louis Chemical Company.

Mr. Stone: No one else?

Mr. Lyon: Nobody else was asked to be adjudged a bankrupt. Who else would you address it to?

Mr. McArthur: There is a petition you have read in evidence. Will you leave that so that the reporter can copy it?

Mr. Lyon: Not the slightest objection. I next offer in evidence a stipulation in that matter adjourning the hearing.

Mr. Stone: We make the general objection that it is immaterial.

The Court: The same ruling.

Mr. Stone: An exception.

Mr. Lyon: Adjourning the hearing until July 23d, 1909, at one o'clock in the afternoon. Filed July 17th, 1909.

Mr. McArthur: May we have an objection and exception to each one of these matters?

The Court: On the same objection that you made before?

Mr. McArthur: Yes.

The Court: Yes. If there is anything comes up that requires a different kind of an objection, you better make it, but that objection, so far as it applies, may be taken to each one.

18 Mr. Lyon: I next offer in evidence an order of Judge Swan of November 9th, 1909.

Mr. McArthur: Did you read any appearance of the attorney for the alleged bankrupt?

Mr. Lyon: Not yet. The nearest to the appearance is the stipulation.

Mr. McArthur: Before that there was no appearance?

Mr. Lyon: I don't think so; I didn't catch one. I don't mean to leave out anything that will throw any light on the regularity of the proceedings. No, nothing before that. There is no proper appearance upon the record except that stipulation and the signature of the solicitor to the answer. This order to which I have referred is entitled in the cause and dated November 9th, 1909. On motion of William A. Bahlke, attorney for petitioning creditors, L. C. Palmer, attorney for the alleged bankrupt consenting thereto, it is now by the Court ordered that the petition for adjudication filed herein and the answer be referred to Lee E. Joslyn, one of the referees in bankruptcy of this Court, as special master to take the testimony thereon and report same to the Court with his opinion thereon. Henry H. Swan, District Judge. Seal of the Court. Filed November 17th, 1909. Lee S. Joslyn, Referee.

Mr. Stone: I would like to have it appear upon the record that the defendant in this case is not raising any question as to the sufficiency of these proceedings to give the Court jurisdiction to make the adjudication in bankruptcy. So that it may appear here it is not necessary to read these proceedings or introduce them for the purpose of leading up to a showing of jurisdiction of the Court to make the final adjudication in bankruptcy.

The Court: I think you gentlemen can agree upon what was adjudicated, to the extent that it binds anybody; perhaps
19 you can get along without reading them. Do you think you can do that?

Mr. Lyon: I don't imagine we could, Judge. I will state what

I claim for them, and if counsel will agree to it, it will be satisfactory.

The Court: You may state what you claim.

Mr. Lyon: Having read the petition, I would like to read the answer, and I claim for it that the defendant admitted on oath that it was paying these banks named in this petition ahead of its other creditors, claiming that it had the right to do that and denying that it was insolvent, and denying any intention to create a preference or to violate the bankruptcy act; that that issue was tried out, evidence taken at considerable length before the referee in bankruptcy and that he found and reported to Judge Swan that he——

Mr. McArthur (interrupting): An exception to his stating that to the jury.

The Court: If they object to it, you better read the paper.

Mr. Lyon: I am only stating what I expect to prove by these papers.

Mr. Stone: We raise the question on what he has already stated, that admissions by the bankrupt are not binding in any manner upon this defendant, are not evidence of any kind against this defendant, and who, if your honor please, was not a party to that proceeding and was not a creditor of the bankrupt.

Mr. Lyon: It is at least binding upon the company, if the Court please.

Mr. Stone: We were in no way interested in that proceeding.

Mr. Lyon: That is not correct. A creditor cannot take the money of an insolvent without four months of the filing of the petition and then say they are not interested in the proceeding. The law makes them interested.

Mr. Stone: We were not a creditor.

The Court: If they concede that, that would be about the end of this case.

Mr. Bahlke: What were you taking this money for?

Mr. Stone: We were not a creditor at the time this petition was filed or these bankruptcy proceedings were had.

The Court: It is evident you cannot agree upon those things. He may proceed with the reading of the papers.

Mr. McArthur: An exception.

Mr. Lyon: I read the answer of the St. Louis Chemical Company (reading answer referred to).

Mr. Giddings: I make the objection that the answer is incompetent under the declaration in this case and is not binding upon the defendant as to any admissions made by the bankrupt in that answer; the defendant is not bound. It is incompetent and prejudicial to the defendant in this case to be read.

The Court: What do you claim for the declaration.

Mr. Giddings: That the declaration is not broad enough to introduce the pleadings in the case before the referee in bankruptcy. That no allusion is made to that; simply a statement as a statement of fact that on a certain date named in there, the 23d of April, 1911, I think, that the St. Louis Chemical Company was adjudged a bankrupt; that is all.

The Court: Would you have to, ordinarily, if you were suing upon any judgment, in order to avail yourself of the right to show what was adjudged and offer the files in evidence, would you have to recite that in your pleadings?

Mr. Giddings: You would have to refer to the pleadings; if you seek to recover upon a judgment, it must be properly pleaded
21 or a decree. There is no declaration upon a judgment or decree in this case, and the authority is ample on that proposition that you must declare upon your judgment.

The Court: Don't they set up in the declaration that there was an adjudication in bankruptcy?

Mr. Lyon: Yes.

Mr. Giddings: Yes, but on what grounds they don't say. They don't set up in the declaration that this answer was filed and an issue made in their declaration at all.

The Court: What was the plea filed here?

Mr. Lyon: General issue.

The Court: I think this is sufficient after pleading the general issue.

Mr. Lyon: I copied a declaration which Judge Stone held was proper when he was on the bench.

Mr. Stone: I object to those remarks as prejudicial. It is not so much the fact that the declaration does not count upon the judgment as it is the fact that they set forth in the declaration the facts that they were insolvent at a certain time and that they were insolvent at a certain time four months before, and all of the different facts necessary to be shown, they set those up as facts in their declaration and claim that they will come here into this Court and establish those as facts. Under our general issue, that put them all in issue. Here in this case, instead of undertaking to prove in this case that they are facts, they seek to show a judgment of another court that they were facts.

The Court: The Court has ruled once that you could not always tell from the judgment what was adjudicated without reading the papers that go along with it. That is the general rule. You may proceed.

Mr. Stone: An exception.

22 (Mr. Lyon reads answer in bankruptcy case.) Endorsed upon the back, Number 421. Entitled in the cause. Signed L. C. Palmer, attorney for alleged bankrupt. Stanton, Mich. Filed in the clerk's office, July 15th, 1909, at 9 o'clock a. m. Carrie Davison, Clerk, by Isabel A. Ballou, Deputy Clerk. Filed Nov. 17th, 1909. Lee E. Joslyn, Referee.

(Recess for 15 minutes).

Mr. Giddings: We now move to strike from the record the contents of the petition as read and the contents of the answer as read, as being prejudicial and incompetent to bind the defendant in this case, not necessary to establish the adjudication in bankruptcy which took place on the 26th day of April, 1911; that the contents

of the petition and the contents of the answer are in no wise binding upon the defendant and have no place in this case for the consideration of the jury, therefore incompetent and immaterial.

The Court: Without ruling whether they have any place for the consideration of the jury, at the present time, the Court makes the same ruling as he did before.

Mr. Giddings: An exception.

Mr. Lyon: I next offer in evidence, from Exhibit C, the report and opinion of Lee E. Joslyn, special master in the matter of the adjudication.

Mr. Giddings: We object to the reading of that upon the record for the reasons already assigned in regard to the petition, as prejudicial, therefore incompetent and immaterial, and for the further reason of its incompetency that the defendant in this case is nowhere mentioned or, so far as the report is concerned, is not taken into consideration in making his report for an adjudication, and therefore this defendant is not bound.

The Court: The same ruling.

Mr. Giddings: An exception.

23 Mr. McArthur: We want to make it clear, in amplifying what my brother has just said, that the referee, it seems to me, even in his opinion, does not base his adjudication on any proceeding or preference on the part of the Gratiot County State Bank, the defendant in this case. He does mention other preferences, but he does not mention the Gratiot County State Bank. And it seems to me that that ought to be clearly brought to the attention of the Court that certainly a proceeding of this kind could not be binding upon a defendant without regard to those preferences if the referee in bankruptcy did not take it into account in deciding the case. Your honor asked me some time ago if I had any authority upon the question, and I stated I didn't come here prepared to take up this proposition, but I do find the rule substantially as I stated it to your honor to be laid down in a note to the case in the second American Bankruptcy Reports (page 383). I would like to read this short note upon this question. (Reading case).

The Court: I don't think there is any doubt about it. The same ruling as before.

Mr. McArthur: An exception.

(Mr. Lyon reads report of Mr. Lee E. Joslyn, special master).

Mr. McArthur: We would like to have the record show that we object to the reasons given by the referee in his opinion for reaching his conclusion that the party was bankrupt and that the reasons he gives are wholly immaterial, the opinion is wholly immaterial, and we suppose an exception will follow the ruling.

The Court: The Court has not ruled that the reasons for it are material.

Mr. McArthur: Then we object to it.

The Court: I evidently don't make myself plain to you, Mr. McArthur. You assume all the while I am ruling upon the

24 proposition that you are presenting. I have not ruled on that at all; I have not ruled that this is evidence of any prefer-

ential payments. I simply ruled that I thought these papers were competent as proving what was adjudicated there. For that purpose I permitted them.

Mr. McArthur: An exception.

Mr. Stone: Your honor ought to take notice of the fact that the reading of these papers here to this jury is very prejudicial to the defendant, and practically disqualifies the jury from sitting here and making a fair judgment upon such facts as your honor may submit to them from facts as they may be elicited here upon the witness stand, and it is for that reason that we complain about it.

The Court: I thought I had ruled upon that about an hour ago, but I don't have any good luck making myself understood in this case. The same ruling as before. Proceed.

Mr. Stone: An exception.

(Mr. Lyon reads report of Mr. Joslyn).

Mr. Stone: Inasmuch as I understand from an examination of that that he does not return here the testimony——

Mr. Loyn (interrupting): Yes, it is here, and I would be glad to read it if you will consent to it. All the testimony is here. I withdraw my statement that I would be glad to read it. I don't know as I care to do that because our contention is, that for all material purposes in this case, the adjudication, when it is here, shows the basis upon which it is adjudicated and is res adjudicata. I withdraw that statement.

Mr. Stone: If this goes to the jury we claim the right to show by the testimony that his decision in that was not founded upon the testimony.

25 Mr. Lyon: That cannot be done. That is conclusive upon that.

The Court: That assumes that the Court is going to rule that that may go to the jury for them to determine upon. I have not so ruled. I have not announced that I expected so to rule. If you gentlemen will pay a little attention to what my rulings are here, we will get along better.

Mr. Lyon: In that connection I would like to read the request for findings, in Exhibit C.

Mr. McArthur: I object to that as immaterial.

The Court: It may be read in connection with the other, to show the proceedings.

Mr. McArthur: An exception.

Mr. Lyon: I interrupt the reading of the other, and read at this point the request and the findings of the commissioner in reference thereto (reading requests and findings). I next offer in evidence Exhibit D, the adjudication.

Mr. Giddings: I move to strike from the record the contents of the report of the referee in bankruptcy as incompetent, immaterial and prejudicial to this defendant, and in no wise binding, because it has no reference to the payments made to the defendant.

Mr. Lyon: If it has no reference to any payments made to this defendant, how could it prejudice this defendant?

Mr. Giddings: It has no business in this case, and therefore

prejudicial to the interests of the defendant, and no evidence of the facts therein stated in this case.

Mr. Lyon: It is the same question again.

The Court: Yes, I have stated upon the record the position of the Court; the Court will make the same ruling without stating it again.

Mr. Giddings: An exception.

26 (Mr. Lyon reads Exhibit D) Entitled in the cause. District Court of the United States for the Eastern District of Michigan, Northern Division. In the matter of the St. Louis Chemical Company, Bankrupt. Order of adjudication. Filed April 26th, 1911. Carrie Davison, Clerk, by Isabel A. Ballou, Deputy Clerk.

Mr. Giddings: We object to this as not binding upon the defendant in this case and only competent to establish the adjudication in bankruptcy on that date.

Mr. Lyon: If it establishes that, then it is material and would be received.

The Court: The same ruling as before.

Mr. Giddings: An exception.

Mr. Lyon: Is there any question but what that is the original adjudication under our stipulation?

Mr. Stone: I have given my reason why it is incompetent on the record.

Mr. Lyon: Is there any question but what that is the original adjudication.

Mr. Stone: I don't think there is any question about that.

The Court: I don't understand they question that.

Mr. Lyon: I next offer in evidence the order of reference. Entitled in the cause. Filed April 27th, 1911. Geo. A. Marston, Referee.

(Mr. Lyon reads order of reference).

Mr. Lyon: I next offer in evidence the schedules filed by the bankrupt.

Mr. Stone: We object to the introduction of the schedules as not being any proper evidence against the defendant in this case.

Mr. Lyon: Numerous courts have held that they are competent.

The Court: The Court does not rule that they are, but holds that they may be read under the other ruling.

27 Mr. Stone: An exception.

(Mr. Lyon reads Schedule A.)

Mr. Stone: We have now gone past the decree of bankruptcy in this case. These are subsequent proceedings and may be material here under some questions that you may submit to this jury, and therefore it is not competent to read them here before the jury.

Mr. Lyon: I call the Court's attention to the 99th Northwestern, a Minnesota case, referring to a large number of authorities where the Court lays down the rule that the schedules of assets and liabilities are always competent in just this kind of cases; 99th Northwestern, page 675. I state to the Court that while I am not certain that that would be binding upon the defendant here, it is binding upon

the bankrupt. These schedules refer to the time of the filing of the petition and are an admission of the bankrupt of the amount of its debts at that time and of its assets at that time, and would be at least binding upon the bankrupt. I am not offering this upon the question of bankruptcy at that time, if the Court please, because that I shall contend is adjudicated and determined and not open to dispute by the adjudication in bankruptcy, but they are competent as an admission by the bankrupt of the amount of its debts which it owed at that time. That is the particular purpose for which I wanted to call the Court's attention here, to be used in connection with the proofs of claims which are filed and which will be offered a little bit later.

Mr. Stone: We claim it ought not to go to the jury. We claim it is not evidence to go to the jury of the facts; that it must be proved here in open court, and cannot be proved by a statement made in another court where we were not a party and was not heard and had no opportunity to be heard.

28 The Court: What am I to do in the absence of any authority to the contrary of this?

Mr. Stone: An exception.

(Mr. Lyon reads schedules in full.)

The Court: Some portions of this reading may or may not be submitted to you. The Court will instruct you later on how much any of this testimony that has been read in your presence may be considered by you. Possibly it may be entirely taken away from you or only considered by the Court in arriving at certain legal questions. Don't make up your minds anything about this case yet until you hear more of it.

(Here adjourned until 9 o'clock tomorrow morning.)

(Proceedings of February 18th, 1914.)

Mr. Lyon: I next offer in evidence the order of George A. Marston, Referee in Bankruptcy, dated June 10th, 1911, reciting that on the 26th day of April, 1911, the St. Louis Chemical Company was adjudicated a bankrupt and that the first meeting of the creditors would be held at the office of William A. Bahlke, Alma, Michigan, on Thursday, the 22d of June, 1911, at 9 o'clock a. m., and for creditors to appear and prove their claims and appoint a trustee to examine the bankrupt and transact other business. I introduce proper proof of service of notice by mail of the first meeting of the creditors, the proof consisting of a printed notice, together with typewritten certificate of service by notice by George A. Marston, Referee in Bankruptcy, dated June 12th, 1911, and filed on the same day by George A. Marston, Referee. In that connection I should have said that the notice of the first meeting of the creditors, which I just stated, was filed by George A. Marston, Referee, on June 10th, 1911.

Mr. Giddings: I object to that as incompetent for the rea-

29 son that the defendant in this case is not a creditor.

Mr. Lyon: The courts appear to differ with my brother upon that proposition. If they received the money within the four months

they stand in the position of creditors and are charged with notice, but whether so or not don't make any difference here.

Mr. Giddings: The defendant's name does not appear in the list of creditors, consequently there was no service upon it of that notice, therefore incompetent in this case.

The Court: It may be received for the same purpose I received the paper yesterday.

Mr. Giddings: An exception.

Mr. Lyon: I next offer in evidence proof of service of publication of notice of first meeting of creditors, and so forth, filed June 22d, 1911. George A. Marston, Referee. Do you care to have that read?

Mr. Stone: I don't care about it.

The Court: I would not think there is any necessity of reading it.

Mr. Giddings: I object to that for the same reason.

The Court: The same ruling.

Mr. Giddings: The same exception.

The Court: You can make it a part of your record if you go to the Supreme Court.

Mr. Lyon: The proof of publication there shows that that was published in the Gratiot County Herald. I next offer in evidence from the calendar of the referee in bankruptcy in this case under date of June 22, 1911, the following entry: 9 a. m. attended first meeting of creditors at Alma. Present, William A. Bahlke and D. L. Johnson, attorneys, and George S. Aldrich, secretary of St. Louis Chemical Company.

Mr. McArthur: I object to that and ask that it be stricken out as incompetent, immaterial.

30 The Court: It may stand.

Mr. McArthur: An exception.

Mr. Lyon: Do you raise any question about this being a part of the referee's files and records in the case?

Mr. Stone: I understand you are reading from the files, but my objection is that you cannot prove a meeting of creditors by simply reading from some endorsement and calendar entries.

Mr. Lyon: This is his calendar. You are not questioning, but this is the only calendar he kept?

Mr. Stone: I don't know about that. I say that purports to be, as I understand it, the calendar in that case.

The Court: This is a part of the papers that were conceded yesterday?

Mr. Lyon: Yes, sir.

The Court: The trouble here is not over the question of the authenticity of these papers; it is a question of whether or not, if he was here and said it was his calendar, would that be competent; that is your position?

Mr. Stone: Yes. It was just the same as though Mr. Marston said it.

The Court: It may be overruled.

Mr. Stone: An exception.

The Court: The Court does not hold that it proves the meeting

of the creditors, but it is a part of the records and history of the case, and I think it is proper to put it in evidence.

Mr. Lyon (reading): June 22, 1911, 9 a. m. Attended first meeting of the creditors at Alma. Present, William A. Bahlke and D. L. Johnson, attorneys, and George S. Aldrich, secretary of St. Louis Chemical Company. D. L. Johnson of Alma, Mich., being the only nominee, was unanimously elected trustee with a bond of $1,000. Meeting adjourned until Tuesday, July 25th, 9 a. m. June 27th.

31 Mr. Stone: The same objection to the next calendar entry.

The Court: The same objection to all of them if you wish, all the calendar entries.

Mr. Stone: I don't know as I want to object to all the calendar entries.

The Court: This one may be overruled.

Mr. Stone: An exception.

Mr. Lyon (reading): June 27th. Received, filed and approved bond of trustee. Next I offer in evidence the bond of the trustee dated June 22, 1911, signed by D. Lloyd Johnson as principal and the United States Fidelity and Guaranty Company as surety. You don't care to have it read, do you?

Mr. Stone: No.

Mr. Lyon: Filed and approved June 27th, 1911. George A. Marston, referee. I next offer in evidence the petition of D. Lloyd Johnson as Trustee of the Bankrupt, filed February 26th, 1912, by George A. Marston, Referee, for leave to bring suits to recover certain moneys, including the moneys sought to be recovered in this case.

Mr. Stone: That is objected to as being incompetent, irrelevant and immaterial.

The Court: It may be received.

Mr. Stone: An exception. We also take an exception to the reading of it to the jury.

Mr. Lyon: I was not going to read it. This is all for the Court, to show our right to be in this Court.

The Court: I don't see any necessity of reading it.

Mr. Lyon: Also following that the order of the referee referring to the petition, authorizing the prosecution and commencement and prosecution of certain suits, signed by George A. Marston,

32 Referee in Bankruptcy. Filed February 27th, 1912, by George A. Marston, referee.

Mr. McArthur: The same objection to that.

The Court: The same ruling.

Mr. McArthur: An exception.

Mr. Lyon: I next offer in evidence the certificate of George A. Marston, Referee in Bankruptcy, dated January 18th, 1913, that the following attached list of creditors having filed in the office of the referee proofs of claims against the estate of the above named bankrupt in the sum set opposite their respective claims, and said claims not having been objected to by the trustee or any of the cred-

itors therein, it is ordered that said claims be and the same are hereby allowed. Filed January 18th, 1913. George A. Marston, referee.

Mr. Stone: That is objected to as incompetent, irrelevant and immaterial, and for the further reason that it is not admissible under the declaration in this case.

Mr. Lyon: We allege in the declaration, if the Court please, that claims had been presented to, and proven, in a large amount and that there are no moneys in the hands of the trustee to pay them.

Mr. Stone: The declaration does not allege that any general claims have been allowed. I understand it has been held to be a necessary allegation. For all that appears in the declaration, all these claims may be secured. I would like the further objection upon the record that, as we understand the bankruptcy law, claims must be proved, and the mere fact that a claim is presented and no one objects to it does not authorize the allowance of the claim.

The Court: Could you raise that if the proper official in bankruptcy does pass judgment upon it and allow it?

Mr. Lyon: They were all proven.

33 Mr. Stone: Not without the Court holds that the defendant was a party to it.

Mr. Lyon: I will show in a minute when I offer the claims.

The Court: After the plea of the general issue, the Court will treat the declaration as amended.

Mr. Stone: An exception.

Mr. Lyon: I next offer in evidence a list of the claims referred to in the order which I just read, together with the various claims as presented and filed by the referee in bankruptcy, together with the dates of filing and the certificates of filing. I don't care to read those claims now, but I would like to read the list of claims and the amounts. They are all proven, and if you care to examine them we will submit them to you. They appear to all be proven in the regular way under the bankruptcy law.

(Mr. Bahlke reads list of claims allowed against the bankrupt estate.)

Mr. Giddings: I object to the reading of any claims allowed against the estate by the referee or by the trustee.

Mr. Lyon: We don't claim any was allowed by the trustee. He has no capacity to do that.

Mr. Giddings: By the referee, other than the claims set up in the declaration, as incompetent, irrelevant and immaterial.

The Court: They may proceed.

Mr. Giddings: An exception. If there is no objection you may just read the names and the amounts.

Mr. McArthur: I think we would like to have the local creditors if there are any of them mentioned.

The Court: With their addresses?

Mr. McArthur: Yes. I do that because Brother Lyon
34 stated that there was a large number of local creditors.

Mr. Lyon: From the files on the chancery side of this Court, in the case of Security Savings Bank and Trust Company,

Complainant, vs. St. Louis Chemical Company, Defendant. Any question but I hold those files?

Mr. Stone: If you say they are.

Mr. Lyon: They are. I offer in evidence the petition of the Gratiot County State Bank made by A. B. Darragh, its president. Filed April 5th, 1911. Entitled in the cause.

(Mr. Lyon reads petition of Gratiot County State Bank.)

Mr. McArthur: For what purpose is this petition offered?

Mr. Lyon: For the purpose of showing that among others that the note in question upon which the payments in question were made was not a secured claim but was a common claim, a common unsecured claim, the same as these other creditors who held the $17,000 of debts against this company, I propose to follow that up by showing that under proceedings in this Court, by decree of this Court, this Court held that the $44,000 of bonds were not issued, not lawfully issued, they never had any validity or force whatsoever, and therefore that the bank was not a secured creditor.

Mr. McArthur: I object to that as incompetent and immaterial.

The Court: It may be received. If they take that position, wouldn't it be necessary for them to offer all the proceedings leading up to that judgment to show what was litigated there? If I remember it, it was a petition that initiated the proceedings upon which I afterwards determined the invalidity of those $44,000 of bonds. How would you get a history of it before the Court except to offer the papers?

Mr. McArthur: It is one thing to get it before the Court and another thing to read it to the jury. If it is only offered for the purpose of satisfying the Court that your decree was made with proper jurisdiction, then I can see no necessity of reading it to the jury.

Mr. Lyon: If that is so, why should counsel misstate the contents of this petition before this jury? I object to his method of doing those things.

The Court: I don't think it will do any harm. I will caution the jury and tell them what things they have to consider. I take it for granted that this jury is intelligent enough not to be prejudiced by anything I afterwards tell them is not for them to determine at all. I don't say that this is or is not for them, but when we get through I will sift out and will tell them what they will have to determine and what testimony they may use. Proceed.

Mr. McArthur: An exception.

(Mr. Lyon reads petition of Gratiot County State Bank in chancery case.) Filed April 5th, 1911. R. E. Hughes, register. C. W. Giddings, attorney for petitioner.

Mr. Lyon: I next offer in evidence from the same files the order of this Court made April 24th, 1911.

Mr. McArthur: What is that? Is that the final decree?

Mr. Lyon: No; it is an order for hearing. I ask counsel to consent in order that it be made to appear clearly that Martha H. Wright, the holder of the $5,000 note which has been mentioned also filed a petition of like import in this Court? If not, I will offer it to show that fact.

Mr. Stone: Yes, I think she did.

36 Mr. Lyon: No question about that, is there, Judge?

Mr. Stone: No. Is there an order of hearing of that petition?

Mr. Lyon: Yes.

Mr. Stone: Yes, I think there was an order of hearing made.

Mr. Lyon: That order was made, of hearing, upon the 24th of April at one o'clock in the afternoon, requiring them to appear and produce evidence of their holdings, and so forth. Dated April 8th, 1911. Signed Kelly S. Searl, Circuit Judge, and filed April 8th, 1911 (reading order). Now, I next offer in evidence from the same files the opinion of this Court, which, in view of the fact that it is in pen writing, I don't care to read. You are familiar with it, are you not, Judge Stone?

Mr. Stone: Yes. Is it the opinion upon which the decree was made?

Mr. Lyon: Yes; it is the same opinion I read upon the other trial. Filed August 8th, 1911, but it is an opinion holding——

Mr. Giddings: We object to the opinion as being incompetent and immaterial, no part of the judgment, and therefore we object to any explanation of counsel of its contents.

Mr. Lyon: If there is any question about it, I offer to read it.

Mr. McArthur: I object to its being read to the jury. The reasons for the Court's holding are wholly immaterial.

The Court: I don't see any necessity of reading it. The Court will take notice of what was in it.

Mr. Lyon: An exception. That was filed August 8th, 1911.

The Court: But I didn't mean to rule that you could not

37 read it. I don't think I will rule that it is incompetent, but I suggested that I would not read it.

Mr. Lyon: I think I would like to read it.

Mr. McArthur: An exception.

Mr. Lyon reads opinion of Court.

Mr. Lyon: That opinion was filed August 3d, 1911. I next offer in evidence decree of this Court, dated August 25th, 1911, signed by Kelly S. Searl, Circuit Judge, and countersigned by R. E. Hughes, Register in Chancery, and filed and entered August 25th, 1911. That is simply the decree covering other matters and also——

Mr. Stone (interrupting): That is the decree for distribution?

Mr. Lyon: That takes care of this matter also, does it not?

Mr. Stone: Yes, sir; it was all the decree that was made.

Mr. Lyon: That was the final decree.

Mr. Stone: It was not the final decree in the foreclosure case, but the final decree in distribution.

Mr. Lyon: Yes, sir, and that disposed of where the funds should go.

Mr. Stone: Yes.

Mr. Giddings: I object to that as immaterial, irrelevant and incompetent for any purpose in this case as affecting the defendant, having been made at a subsequent time to the petition filed in bankruptcy and the adjudication and the action of the defendant in this

case in adjusting its mutual accounts with the Chemical Company.

The Court: It may be received for the purpose of showing the history of the transaction, and also upon the proposition that
38 Mr. Lyon offers it to show the character of this claim, whether it was secured or unsecured claim.

Mr. Giddings: An exception.

Mr. Lyon: I also offer in evidence all of those files, merely to show that no appeal was taken to the Supreme Court by or in behalf of the defendant in this case.

Mr. Giddings: We will concede there was no appeal taken by the defendant in this case

Mr. Lyon: And that that order of the Court was final as to this defendant?

Mr. Giddings: Yes, sir.

Mr. Lyon: Very well; that will cover that.

The Court: I would not make any difference, anyway. The Supreme Court affirmed this opinion. It didn't make any difference which one appealed from it; it is final as to all of them, isn't it?

Mr. Lyon: Yes.

The Court: In view of the objection made to the opinion being read here, I will caution the jury at this time, and say to you that the purpose here of that opinion that I wrote in that case does not apply to anything that will be submitted to you. The Court in that case determined the rights of the parties as to the different bonds here, and the Supreme Court affirmed that determination, and that is final as to everyone, but that will be a matter of law for the Court to decide. Probably the jury will not have any question to decide about that. However, you will bear in mind the instructions I gave you and listen to those along with the other evidence, and the Court will give you final instructions on it later.

Mr. Lyon: I offer in evidence all of those files merely to prove the negative fact that no other order was made or decree was made by this Court touching the petition of the Gratiot County State
39 Bank, which I presume will be conceded.

Mr. Giddings: There was no other order made.

Mr. Lyon: Except the one which I offered.

FRANK M. THEDIAR, a witness produced and sworn by and on the part of the plaintiff, testified as follows:

Direct examination,

By Mr. Lyon:

Mr. Lyon: I call this witness under the statute permitting us to call the agent or employes of the defendant.

Witness: I live at St. Louis, Michigan. I am the present cashier of the Gratiot County State Bank. I am 46 years of age.

Q. How long have you been cashier of the Gratiot County State Bank?

A. Well, sir, I could not tell you.

Q. Who can?

A. I don't remember the date.

The Court: Perhaps you can give it substantially. They don't always ask for exact dates.

A. I think it is—I could not state, Judge; I don't know.

The Court: Just stop a minute. Here are twelve men that don't know whether you were put in yesterday or twenty year ago.

A. I think around three years ago. Before that I was assistant cashier.

Q. For how long a time were you assistant cashier of that bank before you became cashier?

A. I could not say. It was several years.

Q. You were assistant cashier from some time prior to the first day of July, 1908, were you not?

A. I could not say.

40 Q. Haven't you any recollection upon that subject?

A. No, sir; I could not recollect as to the date.

Q. Were you connected with the bank in any capacity before you became assistant cashier?

A. As a bookkeeper.

Q. How long were you bookkeeper before you became assistant cashier?

A. I don't know, sir.

Q. About how long?

A. I should think probably six or seven years; yet I could not say for certain.

Q. Your memory defective, is it?

A. I cannot remember dates back that far, and I don't know that I can remember transactions any better than dates. I was connected with the bank in some capacity from July 1st, 1908, to June 26th, 1909, and was in the bank substantially all of the time during the banking hours. I have here ready to produce the books and papers indicated by the subpœna served on me.

(Witness produces books.)

Our bank from July 1st, 1908, to July 1st 1909, kept a discount or note register, upon which was entered a list and memorandum of notes which became the property of the bank. Where collateral was pledged to the bank it was usually put in the vault and a notation of it made on the discount register. We also during that same time kept a collection register where collections were entered from day to day as received and a notation made on it as to what was done with them.

(Witness produces collection register.)

Part of the day I made entries upon this book and some of the days I did not. Sometimes we made notations of protest on this book and sometimes we did not. If they were sent for protest it was our practice to do so. The St. Louis Chemical Company kept

an account as a depositor in our bank from July 1st, 1908,

41 down to the time it went out of business, upon which it drew checks to various parties, which checks would be presented to and paid by our bank. I do not know of its keeping an active

account at any other bank. Referring to discount register and the $5,000 note which the petition dated September 25, 1908, No. 25439, that was a note given by St. Louis Chemical Company, payable at our bank and to our bank. It became the property of the bank about the date of it. It ran four months and became due January 25th, 1909. I think the bank had as collateral security to the note some of the $44,000 bonds referred to in the petition of Mr. Darragh—bonds of the St. Louis Chemical Company—but am not able to state the amount of such bonds. The records show that our bank also, in addition to the bonds, held a guarantee of David E. Harrison and Max Lowenstein. I haven't the note or guarantee at present time and I do not know what became of either of them. I knew David E. Harrison at that time.

Q. He at that time was a director of the St. Louis Chemical Company, was he not?

A. I don't know.

Q. Didn't you so understand, that he was a director?

A. I think he was connected in some way as an official; I don't know what.

Q. You so understood it at that time, did you not?

A. Yes, sir.

Q. To refresh your recollection, didn't you understand at that time that he was a director and also the vice-president of the St. Louis Chemical Company?

A. I don't know whether he was or not.

Q. Didn't you so understand it at that time?

A. No, sir; I don't think I did know what capacity he served in.

Q. Did you understand at that time that he was one
42 of the executive officers of the St. Louis Chemical Company?

A. Yes, sir.

I think he was connected in some way as an official of the St. Louis Chemical Company and as an executive officer of it, and I so understood at the time, but I did not know in what capacity. I knew that from July 1st, 1908, down to the time the company went out of business David E. Harrison, from time to time, signed notes as vice-president. I think I have seen his name on notes that came through our bank, either running to our bank or to people who sent the notes there for collection. I was elected cashier, as shown by the directors' record book, which I have here, January 9th, 1912, and I became assistant cashier prior to July 1st, 1908. As assistant cashier my duties were mostly book work. I was, as the term implies, assistant to the cashier of the bank, Bayard A. Church, during that time. He became cashier July 1st, 1908, and remained cashier until after the Chemical Company went out of business, and until June 25th, 1910. As assistant it was a part of my duties to act as cashier during the absence of the cashier and to assist him, as occasion arose, about his duties as cashier. I do not know what became of the guarantee to this $5,000 note, noted here, which was given by D. E. Harrison and Max Lowenstein.

Q. Didn't you tell me a little while ago that you had a guarantee signed by David E. Harrison and Max Lowenstein?

A. Yes, sir.

Now, referring to that $5,000 note, payments were afterwards made upon it, as shown by this discount register, as follows:

$516.67 on February 5th, 1909.
$300 on February 8th, 1909.
43 $700 on February 26th, 1909.
$200 on March 4th, 1909.
$200 on March 6th, 1909.
$500 on March 12th, 1909.
$200 on March 12th, 1909.
$500 on March 13th, 1909.
$400 on March 13th, 1909.
$200 on March 20th, 1909.
$400 on March 23d, 1909.
$500 on March 23d, 1909.
$400 on March 24th, 1909.

Those are all the payments noted here.

I have no recollection of any other amounts being paid on this note. There is a stamp entry on this book of "March 31st, 1909," under the column "When paid," and would indicate that the balance of the note was paid on that date, but the amount does not appear. The amount of this note as shown by our record is not $5,000, but $5,116.67, and did not draw interest until after maturity. It appears upon the books as though the discount was put in the face of the note. This note in question was a final successor of a note of $5,000, dated July 16th, 1907, by same maker and same guarantors, with the bonds as collateral, which came due November 16th, 1907, and that note was succeeded and renewed by a note dated November 27th, 1907, for $5,000, same maker and same guarantors, and same bonds as collateral, which note came due February 25th, 1908, and that note was renewed February 25th, 1908, same maker, same guarantors and same bonds as collateral, and came due May 25th, 1908, and which was renewed May 25th, 1908, by same maker, same guarantors and same bonds as collateral and same amount, due September 25th, 1908; and which was in turn renewed by this note upon which
44 these payments were made in February and March, 1909. I do not know what became of the note after it was paid on March 31st, 1909. I have no recollection whether any of the payments were made to me, but the first entry on the book of February 5th, 1909, was made by me, and I think I made the record of February 8th. I do not think I made the other entries. They are in the handwriting of Mr. Bieber, who was bookkeeper and collection clerk. This discount register was a book in general use in the bank and accessible to Mr. Darragh, the president of the bank, when there, and to Mr. Church, the cashier, when there, and each and all of the men connected with that bank doing business in behalf of the bank would have occasion to refer to it or use it from day to day, and sometimes a good many times a day. Mr. Church was doing most of the work at the window at that time, and, according to the general course of the business and my understanding, the payments were made to Mr. Church or myself and entered by whoever received them

on a scratch book and transferred by Mr. Bieber or myself from the scratch book to this record. Commencing with the note of $5,000 given July 16th, 1907, from that time on down our bank had the guarantee of Max Lowenstein and D. Harrison and eighteen bonds of $500 each as collateral, and all subsequent renewals of it had same collateral and guarantors. Our records showed these facts, and they were open and accessible to inspection to Mr. Darragh, president, and the cashier of the bank, and used in the daily course of business. The payments on this note were all made by checks in favor of our bank. (Witness produces checks.)

(Check marked Exhibit F.)

Exhibit F is the check of $412.39, dated March 31st, 1909,
45 by which the final payment was made of the note in question. The check is signed by D. E. Harrison as vice-president, and I knew all the time this note was there in the bank that he was necessarily a stockholder of that corporation. This collection register, open on December 1st, 1908, was regularly kept, and we undertook to enter all collections received. When marked upon the book, "No protest," it means it came with instructions for no protest. We enter name of payer, where payable, name of owner and his residence—sometimes—P. O. Address of sender, our collection number, amount of collection, date when due, date when paid and date when returned if returned. And that was true as to all collections received against the St. Louis Chemical Company.

Mr. Lyon: I wish to read to the Court and jury certain entries as to collections received from and after that time.

Mr. McArthur: Are you going to put in all of it?

Mr. Lyon: No; I don't care to put in those which were paid, because, from our point of view it did not make any difference if any were paid, but I want to put in those which were not paid, upon the theory that this bank could not protest paper, for instance, one day belonging to somebody else and the same day take money from this Chemical Company and claim to be taking it without notice.

Mr. McArthur: I object to their introducing in evidence the records of this book to show items returned unless they show in connection with it the reason for it and some explanation of it.

The Court: The question is not as to the weight or extent of the evidence, but is it one step in their evidence to show notice.

Mr. Giddings: I think if they show that, that they should
46 also show those items which were paid to show how they were doing business.

The Court: I cannot dictate how much they shall show. The question is, is it competent?

Mr. McArthur: My objection is, it does not tend to show what they wish to know.

The Court: I will admit it for the present.

Mr. McArthur: An exception.

Mr. Giddings: They offer this for the purpose of showing notice to the bank of the condition of the company.

Mr. Lyon: Oh, no.

Mr. Giddings: What do you offer it for?

Mr. Lyon: I have stated what I offered it for.

The Court: Make your objection. What is the objection to it?

Mr. Giddings: If he wants to introduce the items from that book with reference to the Chemical Company, he should introduce those which have been paid and which have not been paid and the reasons minuted on the book and which the witness has testified from.

The Court: The Court will announce that he has no power to dictate what Mr. Lyon shall or shall not put in. All I can do is to rule upon this piece of evidence now offered. I conclude that this is competent testimony, and I cannot exclude it because it don't include something that the attorneys for defendant want to put in along with it.

Mr. McArthur: We say it is not competent unless he puts it all in. An exception.

Witness (reading): Under date December 2d, 1908. No protest dated December 1st, 1908. Payer, St. Louis Chemical Company. Payable here (meaning at our bank). Owner, Corn Exchange National Bank, Chicago, Illinois. Amount, $16.78. Due,
47 sight. Returned December 7th, 1908. That entry means the draft was returned unpaid.

December 2d, 1908. No protest. Date, December 2d, 1908. Payer, St. Louis Chemical Company. Payable here. Racine Knitting Company, Beloit, Wisconsin. Amount, $36.16. Sight. Returned December 10th, 1908.

December 12th, 1908. No protest. Date, December 12th, 1908. Payer, St. Louis Chemical Company. Where payable, city. Owner, Peoples Savings Bank, Saginaw, Michigan. Amount, $87.92. When due, sight. Returned, December 18th, 1908.

December 16th, 1908. Date, December 16th, 1908. No protest. Payer, St. Louis Chemical Company. Payable St. Louis, Mich. Owner Second National Bank, Saginaw, Michigan. Amount $769.55. Demand. Returned December 17th, 1908.

I have produced as requested in the subpœna all the letters received with these drafts and which we wrote in returning them that I could find in the limited time I had. I haven't the letters by which that last draft was sent or returned by us. We usually called the Chemical Company up by phone and if they didn't want the drafts or notes we returned them. By saying "if they didn't want them" I mean if they would not pay them. All these collections entered here were presented to the Chemical Company for payment either by telephone or personally and we did not return them until the company refused to pay. I presume I called on them a few times. I was not doing the collections at that time. When I called they would usually say "return," "don't want it." They didn't go into details. I had access to the books showing the company's deposits in our bank. And I have that account here with me.

(Witness produces record.)

These three sheets numbered 2, 3 and 4 are sheets from a loose-leaf ledger showing the account of the St. Louis Chemical
48 Company with our bank from December 1st, 1908, down as long as the company did business.

(Referring to collection register): Draft of $120.87 dated Oct. 5, 1908, received January 2d, 1909. No protest. On St. Louis Chemical Company. Owner, Commercial Bank of Cleveland. Due January 4th, 1909. There is nothing to indicate and I don't remember whether or not this was paid.

Mr. Lyon (reading from Collection Register): January 5th, 1909. No protest. January 5th, 1909. Payer, St. Louis Chemical Company. Owner, A. J. Weeks, Akron, Ohio. $144.60. Due, sight. Returned January 15th, 1909. Date, January 5, 1909. No protest. Payable St. Louis Chemical Co. Owner, Second National Bank, Saginaw, Mich. Amount $316.14. Returned January 11, 1909.

Date, January 15th, 1909. No protest. Payer, St. Louis Chemical Company. Owner, First National Bank, Omaha, Nebraska. $223. Due, sight. Returned January 25th, 1909.

Date, January 15th, 1909. Payer, St. Louis Chemical Co. Owner, First National Bank, Chicago, Illinois. $100. Sight. Returned January 27th, 1909.

Date, January 19th, 1909. No protest. Payer, St. Louis Chemical Co. Owner, Gen. Electrical Co., Schenectady, N. Y. $50. Sight. Returned January 27th, 1909.

(Two notes were here marked respectively Exhibits G and H by plaintiff.)

Witness: Exhibit H was presented for payment at maturity at our bank and protested. It was a collection.

Mr. Lyon: I offer Exhibit G in evidence. (Reading): $550. St. Louis, Michigan. November 20th, 1908. Ninety days after date for value received we promise to pay to the order of J. T. Baker Chemical Company five hundred fifty and no one hun-
49 dredths dollars at Gratiot State Bank in St. Louis, Mich., with six per cent interest. St. Louis Chemical Company. D. E. Harrison, Vice-Pres. L. B. Alger, Treas. Endorsed J. T. Baker Chemical Co. J. T. Baker, Pres. Certificate of protest showing that it was presented to the Gratiot State Bank Feb. 18th, 1909, and payment refused.

Witness: I don't know to whom it was presented, the cashier or myself, but it was one or the other.

Mr. Lyon (reading from collection register): Date, March 2d, 1909. No protest. Payer, St. Louis Chemical Co. Payable at St. Louis, Mich. Owner, Commercial Exchange National Bank, Chicago. Amount, $17.05. Due, sight. Returned March 9th, 1909.

Date, March 2d, 1909. No protest; payer, St. Louis Chemical Company. Payable at St. Louis, Mich. Owner, Commercial Credit Agency, N. Y. Amount, $2,761.65. Returned March 9th, 1909.

Date, March 13th, 1909. No protest. Payer, St. Louis Chemical

Co. Owner, First National Bank, Omaha, Nebraska; amount, $360. Due, sight. Returned March 20th, 1909.

Date, November 20th, 1908. Protest. Payer, St. Louis Chemical Company. Owner, People State Bank, Detroit, Mich. Amount, $562.27. Due, March 20th, 1909. Returned March 22d, 1909.

Witness: It is likely that this was a note and I should judge it was protested. Either the cashier or myself presented it.

Mr. Lyon (reading): March 16th, 1909. No protest. Payer, St. Louis Chemical Co. Payable, City. Owner, Furniture Commercial Agency, Cincinnati, Ohio. Amount, $183. Returned March 20th, 1909. Memo. Delivered to Jas. K. Wright this date.

Witness: We delivered it to him for the Company upon that date. Jas. K. Wright was an attorney residing and practicing at
50 St. Louis, Mich., at that time. It would be according to our course of business to deliver according to directions from the holder of the paper. We keep the letters received from the various parties sending the collections filed away in their proper order.

Mr. Lyon (reading): Date, March 25th, 1909. Payer, St. Louis Chemical Co. No protest. Payable, City. Owner, Chicago Kenosha Hosiery Co., Kenosha, Wisconsin. Amount, $306. Due, sight. Returned, April 1st, 1909.

No protest; date, March 24th, 1909. Payer, St. Louis Chemical Company. Payable, sight. Owner, Wilbur Mercantile Co., Detroit, Mich. Amount, $149.64. Delivered to Aldrich & Mey as per instructions March 30th, 1909.

Witness: Aldrich & Mey was a collection and real estate firm of St. Louis at that time. Aldrich is an attorney and I think at one time was secretary of the St. Louis Chemical Company, but I do not know at what time. In making entry on our record we enter it in the name of the person from whom we got the collection.

Mr. Lyon: I offer in evidence Exhibit H. Note with certificate of protest attached. (Reading) $551.07. St. Louis, Mich., November 20th, 1908. Four months after date for value received we promise to pay to J. T. Baker Chemical Co. $551.07 at Gratiot County State Bank in St. Louis, Mich., with six per cent interest. St. Louis Chemical Co. D. E. Harrison, Vice-Pres. L. B. Alger, Treas. Together with certificate of protest attached.

Witness: I protested that note. I do not recall that any of these protested notes were afterwards paid by the Chemical Company. I think whatever payments the Chemical Company made upon any of its indebtedness during the months of February and March, 1909, were all made by checks on our bank; there might have been some checks drawn on some other banks but I do not recollect any.

Checks drawn by the Chemical Company upon our bank
51 during the months of February and March, 1909, would come to the attention of either Mr. Church or myself and we would look to see that the check was properly drawn, amount of it, to whose order and if properly endorsed. I think that about February 26th, 1909, the Chemical Company commenced paying

other banks that held its paper by checks drawn upon its account at our bank. I knew of that at the time.

Q. And you also knew, did you not at the time, that some of the directors were upon that paper held by the other banks, either as guarantors like your bank had guarantors or as endorsers upon the paper?

A. I don't recall who was endorsers on those notes held by outside banks.

Q. I didn't ask for specific endorsers, but didn't you understand at the time that some of the directors were endorsers or guarantors of the notes the same as your notes held by your bank had guarantors by directors?

A. I don't know who were on the backs of the notes held by other banks. This 60-day note of $1,247.35 dated March 25th, 1909, due sixty days after date, given by the Chemical Company to order of Handy Brothers Mining Company was in our bank and protested by me for non-payment.

This note dated October 5th, 1908, $420, due 90 days after date, payable at our bank, was received for collection, presented or attention of the company called to it and payment requested and was returned to the party from whom we received it; this memorandum "refused, no reason," was made I think by Mr. Bieber. It would be the duty of anybody that had the collection to make the memorandum if such was the fact. I don't know how many pieces of paper were presented to our bank signed by the Chemical Company during the months of December, January and February, 1908 and 1909, and payment refused and the paper protested by the Commercial Savings Bank of St. Louis or how many were presented at our bank by or in behalf of the other bank and payment refused during that time. I don't know that there were quite a number. I have no recollection of any except Exhibit G, to which you call my attention. I think I have the checks drawn on our bank upon its account and cashed by our bank during the months of February and March, 1909. I find among them a $700 check given our bank, dated February 26th, 1909, but I do not find any check of that date for $1,000 to the Old National Bank of Grand Rapids and I don't know of any place in our bank where that check might be. The $700 check number is 3925. Number 3926 is out. I don't know where it is. Assuming that such a check was drawn on February 26th, 1909, and forwarded to the Old National Bank at Grand Rapids in the ordinary course of business it would be presented at our bank in two or three days. Referring to the account of the Chemical Company, I find a $1000 item on the 27th. I have no one thousand dollar check in this bundle of February checks. I don't find any check of $200 under date of Feb. 26, 1909, drawn by the Chemical Company to Henry J. Tuger among the February checks.

(Witness withdrawn temporarily from the stand.)

FRED C. HENRY, a witness produced and sworn by and on the part of the plaintiff, testified as follows:

Direct examination:

I live at St. Louis; have lived there 30 years. I was a stockholder in the St. Louis Chemical Company from its organization down until it stopped doing business in 1909. I was also a director in the company from the time of its re-organization, I think about 1907. When the company re-organized, they found they needed some money to do business with and we all agreed to
53 each raise $2,500. The directors were myself, Mr. Cocke, Henry Tuger, David Harrison, Mr. Lowenstein, Cass T. Wright, Mr. Pfeitler, Charles La Flamboy and Mr. Hugh. I think each of the directors agreed to that agreement. I do not know as to whether each of the directors performed their part of the agreement. I did. I had the Commercial Savings Bank take their paper. I told the bank that they would put up the bonds; if the bonds were not paid that I would pay it. I don't know that I am now a director in the Chemical Company. I am a director in the Commercial Savings Bank and have been for three or four years. I attended the meetings of the Chemical Company as a director when I was in the city. I did not attend a meeting held on the 22d of March, 1909. I was in Richmond, Virginia, on that date and was not in St. Louis until about 3rd or 4th of April. I never spoke to the bank about the paper and I didn't know until after the thing was all over as to payments upon it by the Chemical Company. I believe they paid about $1,300. I learned that when the court held the collateral bonds were not good.

Q. Witness shown a certain resolution, a part of Exhibit C, and asked to read it, it being a resolution of March 22nd, 1909, and asked if he signed the original of that resolution.

A. I have no recollection of ever seeing it. Yesterday was the first time my attention was called to it. I don't think I ever signed it; I don't think I ever saw it before; I don't have any recollection of it.

Q. Do you testify as to whether you knew payments were being made upon the notes held at the Commercial Savings Bank, guaranteed by you to which you have referred, during the time during which they were being paid?

A. No, I don't have no——

Q. (Interrupting.) Did you make any inuiry of the
54 Commercial Savings Bank at any time as to whether the note of $2,500 was being paid?

A. I don't know as I ever spoke to them about it.

Q. Do you know how much was paid upon it now?

A. Why, I didn't know until after the thing was all over with and then I had to pay it.

Q. Do you know how much is paid upon it now?

A. About $1,300, I believe; I learned that after this suit was over with when they refused to pay the bonds—when the court held that they were not good that were put up as collateral. Then I learned that I had $1,200 to pay the bank; I don't know how much they had paid on it; I know I had $1,200 to pay.

Witness shown a note of July 18th, 1907, for $2,500, given by the St. Louis Chemical Co. by W. H. Cocke, President, and L. B. Alger, Treasurer, and asked if that was the note to which he had referred, replied that he could not say. I never saw it and I could not tell.

Witness: I am acquainted with Mr. Darragh; I don't think I had a conversation with him in the spring of 1909 in regard to the St. Louis Chemical Company. I do not think I had a conversation with Mr. Thedgar in the spring of 1909 in reference to the condition of the St. Louis Chemical Co. I have no recollection of it; or with Bayard Church, and I don't think I did with any of the directors of the Gratiot County State Bank.

Cross-examination.

By Mr. Giddings:

I know I was in Richmond, Va., on the 22nd day of March, 1909, because I looked over data I had at home and I found that I left here for Richmond on the evening of the 19th of March, and reached there on the 22d, and I think I left there on the 1st of April. I think I was at the stockholders' meeting of the
55 Chemical Co. in May, 1909. It came to my knowledge that the Chemical Company were in financial straits, at the time we were served, that I understood that there were bankruptcy proceedings against it.

Q. What was your understanding in regard to their condition, as to being solvent?

Mr. Bahlke: I object to that as incompetent and immaterial.

Mr. McArthur: This is a question of intent under their claim.

Mr. Lyon: So far as the Chemical Company is concerned, the proposition is settled by the bankruptcy court that they were insolvent for four months prior to June 26th, 1909.

The Court: What do you say to that?

Mr. McArthur: We can show what knowledge the Chemical Company had of their own situation.

The Court: He may answer this question.

Mr. Bahlke: An exception.

A. I supposed that they could always pay their debts.

Q. I call your attention to any time before the stockholders' meeting in May, 1909?

Mr. Lyon: The same objection if it covers the period covered by the United States Court, because that is conclusive as against the company and its directors.

The Court: He may answer on cross-examination.

Mr. Lyon: An exception.

A. The same; I always understood that they were in good shape.

Q. What have you to say, Mr. Henry, on May 25th, 1909, if the value of the property at a fair valuation was sufficient to pay the obligations of the St. Louis Chemical Company?

A. Yes, sir.

56 Mr. Lyon: That being answered before we could object, I move to strike it out for the reason that the question was necessarily involved in the proceedings in the Federal Court, and has been determined by that court.

The Court: What was the date of the petition in the Federal Court?

Mr. Lyon: Filed on June 25th, 1909; and the adjudication of bankruptcy was on the 26th of April, 1911.

The Court: What is the date in your question?

Mr. Giddings: May 25th, 1909, at the annual meeting of the stockholders of the Chemical Company.

The Court: You get right down to the question of whether the adjudication goes back of the four months or not, do you not?

Mr. Lyon: Yes.

The Court: Strike out the answer for the present.

Mr. Giddings: An answer to the suggestion made by the court, that whether the payments made by the Chemical Co. were a preference would depend upon their understanding, regarding the financial condition, not what the court passed on in the adjudication some time after that. After they thought they were financially responsible, thought they were able to pay their debts, in making these payments, they would not be making a preference, knowing that they were insolvent, or intending to prefer some one.

The Court: The question is whether or not you may try over the question of insolvency, the actual facts of insolvency, of four months.

Mr. Giddings: I offer that bearing on the very fact I called your honor's attention to.

The Court: The question I want to hear you on first is, may you show as a matter of fact that they were not in fact insolvent during that four months.

Mr. Giddings: I can show what his judgment was in regard to their condition bearing upon their intention——

57 The Court (interrupting): I shall have to hold you down to the question, because I can not hear but one of these questions discussed at a time. It is a question not of theory, motives, or intent, but what is the law, as to whether or not you may show in fact that the company were not insolvent during that four months, that is the question you have asked the witness.

Mr. Giddings: We are trying out the intent here of the bankrupt. We have to try out the knowledge of the defendant. And we have a right to get from this witness, what his understanding, what his knowledge and judgment was, as bearing on the intent of the Chemical Company in making these preferences.

The Court: The question is whether or not you can show that as a matter of fact they were not insolvent during that four month period. Is that question res adjudicati? I will hear you on the other later but not now.

Legal argument.

The Court: I think I will exclude this question.

Mr. Giddings: An exception.

Q. Mr. Henry, what property did the Chemical Company have on 31st day of March, 1909?

Mr. Lyon: That is objected to as incompetent and immaterial in this issue, for the reason that it is a step in an attempt to question the validity, force and effect of the decree of the Federal Court that this company was insolvent at that time.

Mr. Giddings: It bears upon the knowledge and notice to the defendant of the condition of that company; it bears upon the question of whether this was a going concern, at that time, and had been prior to that time, which I will follow up with another question so as to show this jury just the condition of affairs down there so far as their property is concerned, and what they had and that bears
58 on the notice that we should take of the condition of that company.

Mr. Lyon: That whole question is precluded by the adjudication, that for four months from and after February 26th, that company was insolvent. The statute makes no distinction between a going concern; the statute furnishes the test; has it assets enough and more than to equal its liabilities; if it has it is solvent; if it does not it is insolvent. That question has been passed upon. Now upon this proposition this question does not go to the question of notice. The mere fact that this bank knew that that was a going concern is not any notice that would protect it. The question is, did it have reasonable cause to believe that a preference was intended by this corporation, when it made those payments.

The Court: I think I will exclude the answer for the present. I will hear you on it in the morning along with the other questions.

Mr. McArthur: Upon this last question I would like to say, is it possible, even though adopting the rule that we are bound by the adjudication in bankruptcy as to the fact of insolvency, that under a declaration that charges in substance, that they have undertaken to make a fraudulent preference, that a witness—an officer of that company—is not to be permitted to state as bearing on the question of his good faith, whether they had a thousand dollars' worth of property, and owed one hundred thousand, or whether they had a plant here, in actual running operation and that they owed so much money. In other words, as bearing upon the good faith of an officer, and that is an element of this transaction, isn't he entitled to ask, and the jury entitled to know the condition of that company, at that time, even though they are not permitted to go into the question of insolvency, even though the court will charge them as a matter
59 of law that they cannot consider that? How can we meet the question of good faith or whether he intended a preference unless we can permit the witness to explain the condition as he understood it at that time.

The Court: I can only answer you by saying that the Court is endeavoring to follow the adjudicated cases. Theories don't cut much figure in bankruptcy law. What have the courts held on all of these questions? They have passed on every one of them, and there is no reason why you gentlemen could not be here upon both

sides to enlighten the court upon every one of these questions. Take until morning to look these authorities over.

Mr. Stone: I would like to know whether plaintiff proposes to produce the witness here in the morning.

The Court: Proceed with the questions and I will rule on it. The court has very definite ideas on what the law is on this, gentlemen, but I would be glad to hear you if you have authorities.

Mr. Giddings: An exception.

Q. Can you describe the character of the buildings *of* the land and the property of the Chemical Co. that they had there on the 31st day of March, 1909?

Mr. Lyon: Objected to for the same reasons.

The Court: Sustained.

Mr. Giddings: An exception.

Q. Do you know, Mr. Henry, whether in the making of any of these payments charged here in this case by the plaintiff there was any intent on the part of the Chemical Co. to make any preferences?

Mr. Lyon: I object to that.

Mr. Lyon: Have you any personal knowledge in reference to any of those payments?

A. I have not.

Mr. Lyon: I object to that as clearly incompetent under the witness's answer.

60 Q. If any payments were made, do you know of any intent on the part of the Chemical Company to prefer one creditor against the other?

A. I don't.

Mr. Bahlke: I ask that the answer may be stricken out as incompetent.

The Court: I think I will strike it out.

Mr. Giddings: An exception.

The Court: It would be a mere conclusion for he does not know anything about the fact of payment. You would have to prove what the facts were.

Q. Were there any conveyances, transfers, assignments or incumbrances of the property of the St. Louis Chemical Co. or any part thereof to any person with the intent to hinder, delay or defraud its creditors?

Mr. Lyon: I object to the form of the question as immaterial.

The Court: I think I will sustain the objection.

Mr. Giddings: An exception.

The Court: I don't think he can draw the conclusion as to what their intent was.

Q. What was the condition of the company, and what property did it have prior to February 26th, 1909?

Mr. Lyon: Objected to as a double question, and immaterial.

The Court: Sustained.
Mr. Giddings: An exception.

Q. Was there any change in the outward appearance of the chemical plant owned by the St. Louis Chemical Co. at St. Louis after February 26th, and up to March 31st, as compared with its appearance before that time?

Mr. Lyon: I object to that as immaterial.
The Court: Sustained.
Mr. Giddings: An exception.

61 Q. Was the chemical plant being operated in the usual way in the employment of men and carrying on its business during the months of January, February and March and up to the annual meeting on May 25th, 1909?

Mr. Lyon: I object to that as immaterial.
The Court: Sustained.
Mr. Giddings: An exception.

Q. Was the plant absolutely shut down, and not in a going condition until after the action taken by the stockholders on May 25th, 1909?

Mr. Lyon: The same objection.
The Court: The same ruling.
Mr. Giddings: An exception.

Q. Do you know of any reason why the Chemical Company's property at a fair valuation during the months of January, February, March, April and May was not sufficient to meet its indebtedness?

Mr. Lyon: The same objection.
The Court: Sustained.
Mr. Giddings: An exception.

Q. Do you know, Mr. Henry, what the assets and liabilities of the St. Louis Chemical Co. were at the time of the filing of their last annual report in December, 1908?

Mr. Lyon: I object to that as immaterial.
The Court: I think I will sustain that.
Mr. Giddings: An exception.

Q. State, if you know, when the plant shut down and stopped doing business—the Chemical Company?

Mr. Lyon: I object to that as immaterial.
The Court: Sustained.
Mr. Giddings: An exception.

Mr. Bahlke: I understand that you cannot be here tomorrow?

62 A. No, I don't care to be if I can get out of it; I ought not to be out today.

Q. Are you sick?
A. Yes, sir.

Q. Any objection to excusing the gentleman?
Mr. Giddings: No.

FRANK M. THEDGAR resumed the stand for further examination by Mr. Lyon.

Q. Now resuming the subject we had under consideration when you were last on the stand, do you now have the thousand dollar check, by which this company paid that amount to the Old National Bank of Grand Rapids upon the $2,000 note on February 26th, 1909?

A. Yes, sir. I found that check among these checks in the bundle. I have also the $700 check of February 26th, 1909, by which our bank received a payment of $700 on this $5,000 note; check No. 3925.

Q. Have you the check by which $200 was paid on February 26th, 1909, on the Henry J. Tuger note; if so, produce it?

A. (Witness produces checks referred to.) I have the check of $200, dated March 4th, 1909, by which $200 was paid to our bank upon this note in question (producing it).

Q. And also the check of $100, dated March 5th, 1909, by which the Chemical Company paid $100 on the Henry J. Tuger note?

A. (Witness produces check referred to.)

Mr. Stone: I object to the question, but no objection to his producing the check. I object to the question as assuming that it was paid on a note. There is nothing on the check to show that it was.

Mr. Lyon: I will show that by the record. I have the
63 company's cash book here that shows the payments. I will introduce it in a few minutes.

Mr. McArthur: So far as the Gratiot County State Bank is concerned, of course that was paid upon its notes, but so far as the Tuger matter is concerned, we don't know about it.

Mr. Lyon: Do you raise any question but what I have the cash book of the St. Louis Chemical Company covering that period?

Mr. Stone: No, I don't raise any question but what it may be the Chemical Company's book, but we don't concede by that that it is correct.

Mr. Lyon: It is the cash book which it kept in the regular course of business covering that period.

Mr. Stone: Yes, sir.

Mr. Lyon: Then in connection with the evidence which I have already drawn out from this witness as to the identity of these checks, I will go back, if the court please, and offer in evidence from page 43 of the cash book an entry upon the credit side under date of February 27th——

Mr. McArthur: I object to him reading the items of the cash book, for the reason that there is no proof as to their correctness or who kept them.

Mr. Lyon: It is conceded they are books kept in the regular course of business.

Mr. Stone: They are not binding on the defendant in this case. The court won't hold those books are binding upon us.

Mr. Lyon: Is there any question but what a book kept in the regular course of business by this company is competent evidence?

Mr. Stone: There is no evidence that they were kept in the regular course of business.

64 Mr. Lyon: I asked you to concede that and you said yes.

Mr. Stone: I will withdraw that then.

The Court: If Judge Stone says he didn't understand the concession to go that far he may withdraw it.

(Witness withdrawn temporarily from the stand.)

WILLIAM A. BAHLKE, a witness produced and sworn on the part of the plaintiff, testified as follows:

Direct examination:

I was the attorney for the petitioners in the Bankruptcy proceedings against the St. Louis Chemical Co. Prior to the commencement of the proceedings I was at the office of the St. Louis Chemical Co. in St. Louis, and on two occasions I had access to certain of the books of that company. This cash book, marked Exhibit 1, was the cash book used by the company in its business.

Q. Whether or not in referring to the front part of it you identify that by the words "Exhibit 2 Lee E. Joslyn Special Master March 20th 1910"?

A. That is one of the substantial reasons why I identify it.

Q. What do you say as to whether or not this cash book was produced before the Referee in Bankruptcy as the cash book of the company covering the period it purports to cover?

Mr. McArthur: I object to that as leading, immaterial, and incompetent.

The Court: He may answer.

Mr. McArthur: An exception.

A. It was.

Q. When were the two occasions you used it there at the office of the company?

Mr. McArthur: I object to that as immaterial.

65 The Court: He may answer, for the purpose of identifying it.

Mr. McArthur: An exception.

A. In March, 1909, and from the 15th to the 23rd of June, 1909.

Cross-examination.

By Mr. McArthur:

I was not in any way connected with the St. Louis Chemical Company, and I never had been. I had spent no time in their office as employee.

Q. Do you know who made the entries in this book?

A. I did not see them made; I know somebody who said they made them.

Q. All you know is what you have heard somebody say?

A. The bookkeeper of the St. Louis Chemical Co.

Q. You don't know of your own knowledge that that is true?

A. She produced it for me. Miss Noyes was a woman employed in the office of the company at both times when I was there in March and June, 1909. I would not swear positively that I was present at any time when entries were made in this book. My recollection is that Miss Noyes was working at the book in June, 1909, when I was there; I cannot point out any entries in the book that I know were made while I was there.

FRANK M. THEDGAR resumed the stand for further examination by Mr. Lyon.

Direct examination:

Mr. Lyon: I renew my offer of the entry under date of February 26th, 1909, bills payable, Gratiot County State Bank
66 note $5,000; $700, in the column headed "Gratiot County State Bank."

Mr. McArthur: I object to that as incompetent, immaterial, because the book is not properly identified, or proven to be correct

The Court: Under that objection it may be received.

Mr. McArthur: An exception.

(A check was here marked Exhibit J.)

Q. Exhibit J, you say, is the check by which that payment was made?

A. Yes, sir.

Mr. Lyon: I will also offer the entry, under date of February 26th, 1909——

Mr. McArthur (interrupting): I want to object to that before you read it to the jury.

Mr. Lyon: Can't we have one objection to cover all these payments to these banks, and to Henry Tuger?

The Court: Will there be an issue as to whether the money was paid or not?

Mr. Stone: We don't think it is proper as to whether any money was paid to Mr. Tuger.

Mr. Lyon: We think, under our theory, for the purpose of showing that a preferential payment was made, that we expect will become a question of law in any event for the court, as well as for the other purpose of our right to recover under 67 E that the payment was made to take care of directors of this company while the debts of those not connected with the company were refused and allowed to go to protest, that we have a right to show those payments to all of those parties, to all of those banks or directors, the banks holding paper upon which the directors became liable thereon as endorsers or guarantors.

67 The Court: Isn't it more a question of law than of fact. Will there be any dispute between you in regard to the fact of the payments?

Mr. Lyon: I offer in evidence the entry under date of Feb. 26th,

1909, bills payable, Old National Bank, note $2,000, $1,000, in the column headed Gratiot County State Bank.

Mr. Stone: We object to the reading of that before the jury, for the reasons stated by Mr. McArthur, so far as the book is concerned, and the subject matter of it as well as immaterial.

The Court: He may read it.

Mr. Stone: An exception.

Q. Have you the check by which that thousand dollars was paid?

A. Yes, sir.

(Witness produces check.)

(Check just produced marked Exhibit K.)

Mr. Lyon: I offer in evidence under date of Feb. 26th, 1909, bills payable, H. J. Tuger note, check $200, the amount being in the column headed Gratiot State Bank.

Mr. McArthur: The same objection.

The Court: The same ruling.

Mr. McArthur: An exception.

(Check was here marked Exhibit L.)

Q. I call your attention to Exhibit L and ask you if that is the check by which that payment was made?

A. Yes, sir.

Mr. Lyon: I next offer in evidence from the cash book the entry March 4th, 1909, bills payable, Gratiot County note $200, carried out in the column headed "Gratiot County State Bank." Have you the check by which that amount was paid?

68 Mr. McArthur: I object to that; the same objection.

The Court: The same ruling.

Mr. McArthur: An exception.

A. Yes, sir. (Witness produces check.) That is the check.

Q. Have you any doubt but what that was the payment of $200, made on your note that day?

Mr. McArthur: Objected to as immaterial.

The Court: He may answer.

Mr. McArthur: An exception.

A. I don't know, Mr. Lyon, whether it was paid on there; it does not state.

Q. And the $700, one did not state, did it; that states on the corner there. Have you any other means for accounting for the payment of that $200, upon your note on March 4th, 1909, except by that $200 check?

A. No, sir.

(A check was here marked Exhibit M.)

Mr. Lyon: I also offer in evidence from the cash book the entry under date of March 5th, 1909, bills payable, H. J. Tuger note $100, in the column headed "Gratiot County State Bank." Have you that check by which that payment was made?

A. I have the check. (Witness produces check.)

Q. By which that payment was made?

A. I don't know whether that payment was made. It was given to Mr. Tuger and he endorsed it; I don't know what it was made on.

Q. Have you a check of that amount?

A. Yes, sir; there is the check.

(Check just referred to of that amount and date running to Henry J. Tuger, marked eExhibit N.)

69 Mr. Lyon: I next offer in evidence an entry under date of March 6th, 1909, bills payable, Gratiot County note, $5,000, $200 in the column headed "Gratiot County State Bank." Have you the check by which that payment was made? Will you answer the question?

A. I have a check for $200, yes sir.

(A check was here marked Exhibit O.)

Q. Is that the check by which that payment was made?

A. I don't know, Mr. Lyon.

Q. Have you any knowledge of any other means by which that note was paid?

A. No, sir.

Q. You are familiar with bookkeeping, are you not?

A. I think I am, yes, sir.

Q. Look at this cash book, and refer to that entry I have just read there; that is evidently a debit to bills payable, and a credit to Gratiot State Bank, is it not?

Mr. McArthur: I object to that; his conclusion of it.

The Court: He may answer.

Mr. McArthur: An exception.

Q. Speaking as a skilled bookkeeper, that is evidently a debit to bills payable, and credit to Gratiot State Bank. It is evidently an entry to the effect that upon bills payable upon that note $200 was paid and drawn upon the Gratiot State Bank, is it not upon that date?

A. That is the way it reads.

Mr. Lyon: I next offer in evidence under date of March 8th, 1909, bills payable, H. J. Tuger note of $2,500, $200. Have you the check by which that payment was made? If you have, produce it.

(Witness produces check.)

(Check just produced marked Exhibit P.)

70 Mr. Lyon: I next offer in evidence from the cash book the entry under date of March 8th, 1909, bills payable, Commercial Savings Bank, note $2,500, $300 in the column headed "Gratiot County State Bank." Will you produce the check by which that payment was made?

(Witness produces check.)

Mr. McArthur: The same objection to the introduction of that entry.

The Court: The same ruling.

Mr. McArthur: An exception.

Proceedings of February 19th, 1914.

Mr. Lyon: Have you there a check dated February 25th payable to Phillips & Long for $190?

A. Yes, sir.

(Witness produces check.)

(Check just produced marked Exhibit Q.)

Mr. Lyon: I read from the cash book of the Chemical Company under date of February 25th, 1909, bills payable, Phillips & Long, check $190, those figures being in the column headed "Gratiot County State Bank."

Mr. Lyon: I read from the cash book under date of March 4th bills payable Gratiot County note $200, in the column headed "Gratiot County State Bank."

Mr. McArthur: We renew our objection to the reading.

The Court: The same ruling.

Mr. McArthur: An exception.

Mr. Lyon: Also I read from the same book under date of March 5th, 1909, bills payable, H. J. Tuger note $100, in the column headed "Gratiot County State Bank."

Mr. McArthur: The same objection.

The Court: The same ruling.

71 Mr. McArthur: An exception.

Mr. Lyon: I also read from the same cash book, under date of March 6th, bills payable, Gratiot County note, $5,000, $200 in the column headed "Gratiot County State Bank." Also from the same book——

Mr. McArthur (interrupting): Our objection may apply to all of these?

The Court: Yes, sir, it may.

Mr. McArthur: An exception.

Mr. Lyon (continuing reading): Under date of March 8th, 1909, bills payable H. J. Tuger note, $2,500, $200. Under date of March 8th, 1909, bills payable, Commercial Savings Bank note $2,500, $300. Have you that check?

A. Yes, sir.

(Witness produces check.)

(Check just produced marked Exhibit R.)

Mr. Lyon: I next read in evidence under date of March 12th, 1909, State Savings Bank, Stanton, note $81.67. Have you that check, the word "interest" before it?

Mr. Stone: I think we ought to call the court's attention specifically to the fact that entries made on that book, and not appearing upon the check, ought not to be received as any evidence of any fact tending to show notice to the bank. He offers the check, and then he reads from that book other facts connected with it. The book purporting to be made by the Chemical Company. I understand that the purpose of this evidence is to show notice to the de-

fendant, and we insist that entries upon that book, that are not found upon any checks, which went through the hands of the officers of this bank, could not constitute any notice, and in
72 putting it in in this manner, by reading first from the book, and then from the check, it gets it mixed in the minds of the jury so that it will be quite impossible for them to tell what was upon the check, and what was read from the book.

Mr. Lyon: Counsel overlooks the fact that there are two branches to this case, and he has done that all the way through persistently. We have shown by the testimony of Mr. Henry the purpose of the company to raise a certain amount of money, each of the directors to raise $2,500. Now we have promised the court to follow that up by showing that that money was raised from these various banks. Now I propose to follow it up further to show that it was a part of the intention of the company—in fact we have already partly shown it by their statement in their answer in the Federal Court, that they intended to pay off this class of paper first; they claimed the right to do it because it was secured, and this court held that it was not. This is for the two-fold purpose of showing the intention on the part of the company the execution of the intention to pay off that bank papers secured by these bonds, and at the same time so far as the checks constitute any evidence, if they do, to bring notice home to this defendant bank, that the banks were being taken care of, instead of the outside creditors whose paper was permitted in large amounts to go to protest.

Mr. Stone: We insist that the entries upon that book——

Mr. Lyon (interrupting): Judge Stone applied the rule when he was on the bench that where you identify a book as a book of another person, used in the regular course of his business, that makes it sufficiently competent to use and offer it in evidence. At any rate I have identified this book as the book of this company, and
73 it itself is bought by the entries upon its own book as bearing upon the question of intention.

Mr. Stone: So far as binding the bankrupt, probably it does, but so far, as in a case of this sort that it binds a third party, binds a party who was a stranger to the proceeding where the book was used, I say that if at any time I ever held as he is talking about that a book of that sort, would be evidence against a third party of the facts therein contained. I certainly have not the slightest recollection of it.

The Court: The court does not permit it for that purpose. Mr. Lyon didn't claim that you ever allowed it for that purpose. I don't think anybody claims that. The question is, is it competent to prove one branch of their case here, which is they claim that the chemical company made preferential payments and intending to make preferential payments. Must they not prove that intent or some circumstances from which it can be inferred. I think it is competent evidence.

Mr. Stone: An exception.

The Court: The court is not holding now that it binds the defendant here.

Mr. Lyon: I read it in this case to make it clear to the jury that the moneys represented by these charges, upon the cash book here were paid by the checks, which went through this bank.

Mr. Stone: If it is, as your Honor says, evidence of a preferential payment, it is only such evidence when accompanied by certain other things—the element of insolvency—if you are going to take the book of the company as evidence of a preferential payment, then the acts of the company all the way through should be taken; but they propose to put in the books of the company to a certain extent, and then claim an adjudication for the other. That is what we complain about.

74 The Court: I cannot help it, if the law is that the other is res adjudicata, I cannot change it. I have suggested to you several times that you bring in some authorities and present them to the court upon that question.

Mr. Stone: This presents a little different question.

The Court: I haven't ruled yet that that is res adjudicata, as to everything. I am not entirely certain in my own mind, and I would be glad to have you show me what the courts have held.

Mr. Stone: It presents a question of the admissibility of evidence offered in this way. If they are going to take the acts of the Chemical Company as showing an intention on its part to create a preference, then all the acts of the company should come in. If part of it is to be excluded then the whole of it should be excluded.

The Court: This is the first time I have been called upon to rule upon this question of their acts in reference to their intention. The question we had up last night was whether or not you could go into the actual fact of whether or not they were not insolvent. On the question of whether or not they intended a preferential payment, and whether the payment was received with notice, I have not yet passed upon that question. I have been hoping that some of you would bring some authorities in on it so that I would get some enlightenment on it. I think it is competent testimony. I overrul.

Mr. Stone: An exception.

Q. Do you produce the check I have referred to in the last question?

A. Yes, sir (producing check).

(Check just produced marked Exhibit S.)

Q. That was drawn for a draft for that amount, was it not?

A. It states so on the check, yes, sir.

Q. Have you that draft?

A. No, sir.

Q. What do you say as to whether or not a draft was issued for that amount in favor of the State Savings Bank?

A. I presume it was.

Q. Any doubt about it according to your course of business?

A. No, sir, I would not doubt it.

Mr. Lyon: I next read in evidence from the cash book, under date of March 12th, 1909, bills payable Gratiot County State Bank note

of $5,000, $500 in the column headed "Gratiot County State Bank." Have you that check?

A. Yes, sir (producing check.)

(Check produced, marked Exhibit T.)

Mr. Lyon: I next read under date of March 12th, 1909, bills payable, Aldrich & Mey note of $306.94, $125 in the column headed "Gratiot County State Bank." Have you that check?

A. Yes, sir.

(Check marked Exhibit U.)

Mr. Lyon: I next read in evidence from the same cash book under date of March 12th, 1909, bills payable, Commercial Savings Bank $2,500, in the column headed "Gratiot County State Bank," $400. Have you that check?

A. Yes, sir.

(Check marked Exhibit V.)

76 Mr. Lyon: I next read in evidence from the same cash book under the same date, bills payable, H. J. Tuger, $2,500, in the column headed "Gratiot County State Bank," $200. Have you that check?

A. There is a check of that date, yes, sir, and of that amount. There is no evidence in our bank that I know of, of any kind, of the payment being made in any other way except by that check.

Mr. Lyon: March 12th, 1909. I read in evidence bills payable Gratiot County State Bank $5,000, $200 in the column headed "Gratiot County State Bank." Have you the check by which that payment was made?

A. Yes, sir.

(Check was here marked Exhibit X.)

Mr. Lyon: I notice by the record that upon the 12th the Chemical Company paid you first a check of $5,000 on this note, and then again upon the same day they paid you $200 on that note; was that according to the ordinary course of their business with your bank that they would make you two payments upon one note upon the same day?

A. I don't see anything out of the ordinary at all.

Q. Was that according to their business with your bank that they would make you two payments upon one note upon the same day?

A. Well, that is a hard question for me to answer.

Q. You can tell from your records can you not; there is no doubt but you can tell by reference to your discount register, is there?

A. I don't think it is out of the ordinary course of business.

Mr. Lyon: I ask that that be stricken out as not responsive.

77 The Court: Strike it out. Listen to this question.

Mr. McArthur: An exception to striking it out.

The Court: Whether or not you could tell whether you could answer this question if you looked over your discount register?

A. No. The last payment upon notes held by our bank against the Chemical Co. usually was not entered, because that was not necessary. The others are. The last payment and the date of it is indicated by a stamp. Our bank had other notes against the Chemical Company before February 26th, 1909, different notes. I think I could tell by reference to our discount register whether or not the Chemical Company ever made two payments in one day upon any one of those notes. I have no recollection of the company ever paying our bank two payments on one day upon one note. I have no recollection of any other person or corporation doing business with our bank making two payments upon one note upon the same day.

I think that C. H. LaFlamboy was one of the directors of this company. His family lived in St. Louis. He was away on business, I think, most of the time.

Mr. Lyon: I next offer in evidence under date of March 12th, 1909, C. H. LaFlamboy $227.36, in the column headed "Gratiot County State Bank," and ask you whether or not you have he check by which that payment was made?

A. There is the check, to Mr. LaFlamboy. I think it is the same check referred to on the cash book.

(Check marked Exhibit Y.)

Mr. Lyon: I next read in evidence from same cash book, under date of March 13th, 1909, bills payable, Gratiot County State
78 Bank note $5,000, $500 in the column headed "Gratiot County State Bank." Have you that check?

A. Yes, sir (producing check).

(Check marked Exhibit Z.)

Mr. Lyon: I next read in evidence from the same cash book under date of March 13th, 1909, bills payable, State Savings Bank Stanton, note $500, in the column headed "Gratiot County State Bank." Have you that check by which that payment was made?

A. There is a check, yes, sir, of that date and amount. (Witness produces check.)

Q. Any doubt but that is the check by which that payment was made?

Mr. Stone: We object to that question.

Mr. Lyon: I don't propose to have the counsel out on that evidence.

The Court: He may answer.

Mr. Stone: An exception, because the question "is there any doubt," It merely calls for an opinion.

Mr. Lyon: It is on cross-examination.

The Court: He is a person whose opinion is worth more than the ordinary person, and he is the man who had personal charge of the bank there.

Mr. Giddings: He had no charge of the Chemical Company's books.

Mr. Lyon: No, but I am charging the bank on that proposition. I will waive it.

Q. I will ask you if that entry I have just read upon the recor shows, does it not, that the State Savings Bank of Stanton note ha paid $500 upon it, upon that date March 13th, 1909, by check on th Gratiot County State Bank?

A. I don't know what they charged that check up t
79 down to the Bank of Stanton; I was not there. The cas book of the Chemical Company shows that it paid $500 o that date by a check on our bank to apply upon the State Savin Bank of Stanton note.

(Check here referred to marked Exhibit A-1.)

Mr. Lyon: I next read in evidence under date of March 13t 1909, bills payable, H. J. Tuger note $2,500, $300 in the colum headed "Gratiot County State Bank," and ask if you have the chec by which that payment was made?

A. Yes, sir.

(Producing check which was marked Exhibit B-1.)

Mr. Lyon: I next read in evidence from the same cash book und date of March 13th, 1909, bills payable, Commercial Savings Ban note of $2,500, $200 in the column headed "Gratiot County Sta Bank." Have you the check by which that payment was made

A. There is the check that you call for according to the record yes, sir. (Producing check.)

(Check referred to marked Exhibit C-1.)

Q. I notice by the cash book here, and by the checks you produ that this company paid $3,300 to notes held by banks and Hen Tuger in two days, March 12th and 13th. Had you ever known the Chemical Company paying that much upon its notes held b banks, and Henry Tuger before that in any two days?

Mr. McArthur: I object to that as immaterial.

The Court: He may answer.

Mr. McArthur: An exception.

Mr. Stone: We object to the question as being to a certai
80 extent argumentative and furthermore immaterial to th issue.

The Court: He may answer.

Mr. Stone: An exception.

A. No, sir, I have no recollection.

Mr. Lyon: I next read in evidence from the same cash book und date of March 15th, 1909, bills payable, Gratiot County State Ban note $5,000, $400 in the column headed "Gratiot County Sta Bank." Have you the check by which that payment was made?

A. Yes, sir. (Witness produces check.)

(Check produced marked Exhibit D-1.)

Mr. Lyon: I next read in evidence from the cash book under da of March 15th, 1909, bills payable, State Savings Bank of Stanto $3,500, in the column headed "Gratiot County State Bank," $60

and ask you if you have that check by which that payment was made?

A. That is the check according to the record book (producing check).

Q. Do you know of it being paid in any other way except by that check?

A. No, sir, I don't.

(Check produced marked Exhibit K-1.)

Mr. Lyon: I next read from the cash book under date of March 15th, 1909, bills payable H. J. Tuger note, $2,500, $300. Have you the check by which that payment was made?

A. Yes, sir.

(Producing check, which was marked Exhibit L-1.)

Mr. Lyon: I next read from the cash book under date of
81 March 15th, 1909, bills payable Commercial Savings Bank, $2,500, $400. This last item the amount paid, amount of checks being in the column headed "Gratiot County State Bank." Have you that check by which the payment was made?

A. That is the check according to the records, sir (producing check).

Mr. Giddings: When you say records, you mean the cash book he has?

A. Yes, sir.

(Check produced here marked Exhibit M-1.)

Q. Don't you mean also that that is the check by which that amount was paid upon that note according to your records?

Mr. McArthur: I object to that; the record is the best evidence.

The Court: He may answer if he knows.

Mr. McArthur: An exception.

A. I don't know that I have any record of what that check went on.

Q. I am not asking you that; this book here shows that a $400 payment was made on that Commercial Savings Bank of $2,500 upon that day by a check of $400 upon your bank; I ask you whether or not that is in accordance with your understanding from your books of this company's account. Is that not the fact?

A. I should think it was the check.

Q. You haven't any doubt about it, have you?

A. Why, I don't know that I have, no, sir.

Mr. Lyon: I next read in evidence from the cash book under date of March 20th, 1909, the entry Stanton Savings Bank $300 in the column headed "Bank," and ask you if you have the check
82 by which that payment was made?

A. I have the check that record calls for; I don't know what it was paid on, sir.

Q. You know, do you not, from the endorsement, that it went to the Stanton Savings Bank?

A. No, I know that a draft went to them. A draft for that amount was bought with that check, payable to the Stanton Savings Bank.

(Produces check, which was marked Exhibit N-1.)

Mr. Lyon: I also read in evidence from the same cash book under date of March 20th, 1909, Gratiot County State Bank $200 in the column headed bank, and ask you if you have the check by which that payment was made?

A. Yes, sir.

(Producing check which was marked Exhibit O-1.)

Mr. Lyon: I next read in evidence from the same cash book under date of March 23d, 1909, Gratiot County State Bank B. P., that means bills payable, does — not?

A. Yes, sir.

Q. Bills payable $500, in the column headed "bank." Have you the check by which that $500 was paid on your note?

A. Yes, sir (producing check which was marked Exhibit P-1).

Q. I offer in evidence from this cash book the entry under date of March 23d, 1909, Gratiot County State Bank, bills payable $400. Have you the check by which that payment was made?

83 A. Yes, sir. (Produces check which was marked Exhibit Q-1.)

Q. I notice that the company upon that day made a payment of $400 and then a payment of $500, both by check? Aside from the other time when they made two payments back there upon the one day, had this company at any other time, to your recollection, made two payments upon one note upon the same day?

A. No, not to my recollection.

Mr. Lyon: I read in evidence under date of March 24th, 1909, Gratiot State Bank, bills payable $100, in the column headed "bank." Have you the check by which that payment was made?

A. Yes, sir. (Producing check which was marked Exhibit R-1.)

Mr. Lyon: I next read in evidence from the cash book under date of March 31st, 1909, Gratiot County State Bank, bills payable $400, same date checked down, interest $42.39, and ask you if you have the checks or check by which those payments were made?

A. Yes, sir. (Producing check which was marked Exhibit S-1.)

Mr. Lyon: I next read in evidence under date of April 10th, 1909, State Savings Bank, Stanton, on note in column headed bank the figures $250. Have you the check by which that payment was made?

Mr. Stone: I object to that as immaterial.

The Court: He may answer.

Mr. Stone: An exception.

A. There is the check for which a draft for that amount was bought.

84 (Check produced and marked Exhibit T-1.)

The Court: Is that later than any of the payments made to the defendant?

Mr. Lyon: Yes, sir. I offer this, not upon the question of notice, but upon the proposition that the directors of the company carried out the plan which they formulated that a preference was intended, as bearing upon that question only.

Mr. McArthur: The part of it they carried out subsequent to the payment to the bank would be wholly immaterial.

The Court: I hold it is not admissible to show notice, but it is admissible to show what Mr. Lyon offers it for, that they were carrying out the previous intent formed, that is, the scheme that he claims there was, a scheme or arrangement made by which these folks were all to be paid off in a certain class?

The Court: Don't you understand that one of the material questions in this case is whether or not the bankrupt intended to prefer creditors of a certain class or not?

Mr. Stone: I think it is on the question of preference?

The Court: That is nothing more nor less than legal fraud under the bankruptcy law.

Mr. Stone: Constructive fraud.

The Court: What is the difference between proving that kind of fraud and any other kind of fraud? May you not prove it by what the parties do afterwards? I think it is elementary.

Mr. Stone: An exception.

Mr. Lyon: I next read from the cash book under date of April 23rd, 1909, bills payable Stanton Savings Bank, demand note, column headed Gratiot County State Bank, $300.

85 Mr. Stone: An exception to all of this testimony as to matters subsequent to March 31st.

The Court: Yes, sir. I will caution the jury that this cannot be received for the purpose of notice to the defendant Bank, but only for the purpose for which it was offered, and I will instruct you later in regard to that.

Mr. Stone: An exception.

Q. If you have the check by which that payment was made or draft procured to cover that payment?

A. That is the check for draft of $300, on that date; yes, sir.

(Check produced and marked Exhibit "U-1.")

Mr. Lyon: I next read in evidence from the cash book under date of May 1st, 1909, bills payable, the word interest below those words, note of $3,500, Stanton Savings Bank, in the column headed Gratiot County State Bank, $305.12, and I ask you if you have the check by which that payment was made either by the check or by draft?

A. That is the check that purchased a draft for that amount on that date. (Check produced and marked Exhibit "V-1.")

Mr. Lyon: I next read in evidence under date of May 3rd, 1909, bills payable, William Hugh note for $2,500, Citizens State Bank

of Big Rapids, $500, in the column headed Gratiot County State Bank, and I ask if you have the check by which that payment was made, or which procured a draft?

A. There is the check that the draft is bought with for that amount. (Check produced and marked Exhibit "W-1.")

86 Mr. Lyon: I next read in evidence from the same cash book under date of May 11th, 1909, bills payable, William Hugh $2,500 note, Citizens State Bank of Big Rapids, in the column headed Gratiot County State Bank, $400. I ask you if you have the check by which that payment was made, or draft purchased to make the payment?

A. There is the check by which the draft was purchased. (Check produced and marked Exhibit "X-1.")

Q. Will you look at these checks which I have had marked, commencing with Exhibit E-1, F-1, G-1, H-1, I-1, J-1, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, A-1, B-1, C-1, D-1, K-1, L-1, M-1, N-1, O-1, P-1, Q-1, R-1, S-1, T-1, U-1, V-1, W-1, X-1, Y-1, Z-1, and tell me whether or not those checks were presented to, and cashed by your bank upon the several dates that they appear to have been paid by the cancellation stamp of your bank upon the face of them respectively?

A. Yes, sir, I should say they were. Except as I have indicated that drafts were procured they were cashed through our bank. And in the places I have indicated, drafts were procured, for the amount corresponding to the check for the parties to whom the checks indicate the drafts were to go. Those drafts which were procured were afterwards taken out of our account in the bank upon which the drafts were respectively drawn. The other checks not drawn for drafts were endorsed by the payees at or prior to the time of the payment by our bank. The purported signatures of L. B. Alger which appears upon the face of the checks, as Treasurer of the company, I should judge were his signatures, all but Exhibit X-1; but that was cashed by our bank by way of procuring a draft for the amount of the check—$400—payable to the Citizens State Bank of Big Rapids. I don't know what was done with those
87 drafts, I don't know what they done with them. I did not forward the drafts myself.

(A letter was here marked Exhibit Y-1.)

I am some acquainted with the handwriting and signature of L. B. Alger. And were at the time these checks were going through our bank. I knew him during the time he was in St. Louis. I think during the time he was there he was acting as the secretary of this company. I should think that the name L. B. Alger, Sec., on Exhibit Y-1 was his handwriting and signature.

Mr. Lyon: I offer in evidence in connection with the examination, Exhibit Y-1 for the purpose of throwing such light as it does, upon the question of the intent of the bankrupt to make preferential payments, by paying off and retiring the notes secured by the $44,000 of bonds and then having in view to make payments, to

what is ordinarily called the unsecured class of creditors afterward, namely, those holding the $17,000 of debts.

Mr. McArthur: I object to that as incompetent, irrelevant and immaterial and as being a letter written to a third party, not having come to the notice of the bank and not being shown to have been mailed, or delivered, no proof being introduced as to whatever was done with it.

The Court: What is the proof as to where this came from?

Mr. Lyon: There is no proof in at the present time. I shall show by Mr. Bahlke that he received this by mail from the United States Coal Company, to whom it was addressed.

The Court: With that offer I will permit you to put it in evidence.

88 Mr. Stone: That contains a statement of the secretary of an action taken by the company, and it is incompetent for the purpose of showing any action of the company.

The Court: That is not the rule where fraud is shown. Our courts make an exception to the rule that a thing may be only shown by the records, where fraud is charged. It may be received.

Mr. Stone: An exception.

(Mr. Lyon reads Exhibit Y-1 to the jury.)

Six papers were here marked respectively Exhibits Z-1, A-2, B-2, C-2, D-2, and E-2.

Mr. Lyon:

Q. I ask you if you are acquainted with the signature of W. H. Cocke, president of the St. Louis Chemical Company?

A. I think I would know his signature. I could not say for certain that the signature on Exhibit Z-1 is his signature. I know the signature of Mr. Darragh; that is his signature on Exhibit C-2, also Exhibits D-2 and E-2. I believe the signature of L. B. Alger, the secretary of this company, on Exhibit A-2 is his signature, as also that on Exhibit B-2; I have no doubt as to either one of them only from the fact that that one is ink, and pencil, but the formation of the letters I should judge was the same.

I don't know anything about the letterheads of the Chemical Company. Looking at the name purporting to have been signed by W. H. Cocke, president of the company, I don't know whether or not it is his signature, because it is written in pencil; if it was a pen signature, I might. I could not swear from my knowledge and observation of his signature, that it was his.

Mr. Lyon: I offer in evidence Exhibit A-2—letter of March 23rd, 1909, for the same purpose as I offered the other letter,
89 and state to the court that I will follow it up by showing by Mr. Bahlke, that he received this from the Handy Brothers Mining Company, a creditor of this Chemical Company.

Mr. McArthur: I object to that as incompetent irrelevant and immaterial, for the reason that it is not shown to have been delivered, and even though he proves he will prove what he claims he will prove, it is not competent evidence in this case.

The Court: The same ruling as before.

Mr. McArthur: An exception.

(Mr. Lyon reads Exhibit A-2 to the jury.)

Mr. Lyon: Also Exhibit B-2 with the same offer to show that the plaintiff in this case, through Mr. Bahlke, received this letter from the Michigan Salt Association, Saginaw, Mich., to whom it is addressed.

Mr. McArthur: The same objection to this letter. And I want it understood that we object to the contents, as being irrelevant and immaterial to the issues in this case, being written to a third person, and not binding on the defendant.

The Court: It may be received.

Mr. McArthur: An exception.

(Mr. Lyon reads Exhibit B-2 to the jury.)

The Court: The court does not hold that it is binding on the defendant. I think it is competent testimony as bearing on one issue in this case. It may be received.

Mr. Lyon: Now I offer in evidence the checks, a list of which I read awhile ago, commencing with Exhibit I and continuing through the alphabet, and with Exhibit A-1 and down to and including Exhibit Z-1.

Mr. Stone: We have no objection to check of February 26th, $700; March 4th, $200; March 6th, $200; March 12th, $500; March 12th, $200; March 13th, $500; March 15th, $400; March 20th, $200; March 23rd, $400 and $500, respectively, and
90 the other check that was introduced of March 31st, I think, of $442.39.

Mr. Lyon: It is the last payment to this bank?

Mr. Stone: Yes. As to those checks we make no objection. As to the other checks we object to them as being immaterial in this case for the reasons that we have already stated on the record.

The Court: They may be received for the purpose that I indicated when the question was up before.

Mr. Stone: An exception.

Mr. Lyon: A few of those checks, the court and counsel will remember, are offered merely for the purpose of accounting for the fact that the items didn't stand opposite the names on the book, and in view of the charge that was made that the book was not correct.

Witness: I have no recollection, one way or the other, as to whether the interest upon the bonds of this company were paid from time to time through our bank. I understood the company had $56,000 of bonds out, and that in addition to that they also had $44,000 of bonds, a part of which our bank held. I don't know how many bonds our bank held; I don't remember. I don't know what other banks held.

Q. Didn't you understand that the Commercial Savings Bank of your city had a note against this company, and held some of these bonds as collateral security to it?

Mr. Giddings: I object to that as incompetent, under the answer of this witness, that he didn't know. If he understood, or had a suspicion of that, it is not competent.

The Court: Isn't this the rule, that if he had sufficient knowledge to put him upon inquiry, he is bound?

Mr. Giddings: The fact that the other banks did hold these bonds would not be notice to this bank of any of the things complained of in this declaration.

The Court: In this class of cases the scope of the inquiry
91 is pretty broad. He may ask him all he knew about it, and all the information he had about all these transactions, and bonds and debts of the company and what they were doing about paying their debts.

Mr. Giddings: An exception.

The Court: He may answer.

(Last question read.)

A. Why, I understood they had a note, and knew they had a note, against the company, but I don't know anything about what bonds they had. I cannot recall that I knew that they had any bonds.

Q. I call your attention to Exhibit F-2 and ask you if upon reference to that memorandum which you produced from your pocket, you are not able to state that during all of that time you understood that this Commercial Savings Bank of St. Louis held a $2,500 note against the St. Louis Chemical Company?

A. Yes, sir; our records show that; this record shows that. I think I knew at that time that they held a note of that amount. I didn't know that that was a note which Fred Henry had arranged to put into that bank to make up his $2,500 which he, as a director of that company, was to help raise as working capital. I didn't know anything about it. And I did not understand that.

Q. Didn't you understand that that was a note that was carried along from 1907?

A. The record shows that; I don't know as I understood it at that time—the nature of the note—at that time. I didn't know that the Commercial Savings Bank held as collateral to that note some of the $44,000 of bonds of this company. And I cannot say that I so understood it. I can say that I don't remember whether I did or not. I think I remember that Fred C. Henry was a director in that company; I didn't know how long he was a director there; I knew
92 he was a director at one time. I don't know the dates; I think I understood that he was a director when the company went out of existence, and I think he was for a year or two before that time. He was not connected with our bank in any way; I think he was connected with the Commercial Savings Bank of our city. I am not certain as to whether he was a director; I don't remember whether he was a director then or not. David Harrison was a member of the board of directors of our bank during the years 1907, 1908 and 1909. I think I knew during that time that he was the vice-president of the St. Louis Chemical Company, and a stockholder and director therein. I do not know Max Lowenstein personally. I knew of him as a director of the Chemical Co. He was a director during some of the time that Mr. Harrison was a director of the Chemical Company. I don't recall that he was a director all of the time from 1907 down to

the time the company went out of business; some of the time during that time I knew he was a director.

Q. When his name appeared upon the guarantee you have spoken of to your bank, you understood at that time he was a director?

A. Yes, sir.

Q. You understood that it was up to him and Harrison to raise the $5,000 for the company, did you not, in order to give it working capital to do business on?

A. I don't remember that I knew what the note was for.

Q. Mr. Lowenstein, you understood, was a relative of Mr. David B. Harrison, was he not?

Mr. Giddings: I object to that as irrelevant and immaterial.

The Court: He may answer.

Mr. Giddings: An exception.

A. I didn't know whether he was a relative or not; I didn't know anything about it. I didn't understand that at that time.

93 Q. You understood, did you not during the time that $5,000 note was in your bank that that was in there because of the fact that Harrison and Lowenstein had to arrange to raise $5,000, $2,500 apiece as directors of the company to help furnish it working capital?

A. No, I don't think I ever remember anything of the sort. I didn't know what the money was raised for. I don't think I ever inquired to find out how Harrison and Lowenstein were interested in the note. I understood they guaranteed the payment of it. I understood that all the time that that note was in our bank. I don't think I knew the reasons at the time, why they guaranteed the paper.

Q. What did you understand; didn't you understand during all of that time that you held that paper that they were guarantors of that paper because of some reason?

Mr. McArthur: I object to that; the witness has answered that question. He said he didn't know anything about it. He could not understand anything about it.

The Court: I held he might be asked what he understood about it as bearing upon his duty to make further inquiry. He may answer.

Mr. McArthur: An exception.

A. Why, yes, there might be some reason why they guaranteed the note, but I didn't know the reason.

Q. You understood at the time, did you not, the reason; it was because of the fact that they were directors of that company and helping it to raise money to do business on; didn't you so understand it at the time that you held the note?

A. I don't recall that I formed any opinion of it at the time.

Q. You knew, did you not, at the time that your bank took the first of those notes, at the time that Lowenstein and Harrison became guarantors of the paper, you understood then the reason why

94 the money was being raised, did you not, to furnish money for the Chemical Company to do business on?

Mr. Giddings: I submit that he has answered that.
The Court: If he has he may answer it again.
Mr. Giddings: An exception.

A. I don't remember that I knew the reason why; no, sir. I made no inquiry as to why. I don't know that I knew at the time why they guaranteed the payment.

Q. Did your bank ask the company to furnish guarantors, or did they voluntarily furnish them, do you know?

A. I don't know.

Q. Do you know whether the company itself made arrangements for the $5,000, or whether Harrison made arrangements for it?

A. No, I am not certain.

Q. What is your best recollection on that subject; is it not that David E. Harrison made arrangements for that money upon his guarantee and the guarantee of M. Lowenstein?

A. I don't know, sir; I don't remember.

Q. You did know at the time that your bank took the paper on, did you not, who made the arrangements for the paper and the money to result from the putting of the paper in the bank?

A. I don't remember whether I did or not. So far as I know our bank never made any requests of the Chemical Company to make the payments that have been referred to here; so far as I can remember the Chemical Company voluntarily made the payments without any request; including the four payments made on the two days; I did not do it myself personally, and I don't know of anyone else in the bank doing it; I don't know of anybody connected with the bank urging the Chemical Company to pay a dollar on that
95 note during the months of February and March, 1909.

I knew at the time that the two grantors upon that paper were two of the directors of that company.

I knew that Henry Tuger was a director of the St. Louis Chemical company, and had been for a number of years before it became a bankrupt; he was a director of our bank during 1907, 1908 and 1909.

Q. And did you know of the $2,500 note in the Commercial Savings Bank?

Mr. Giddings: He has been over that two or three times.
Mr. Lyon: No, I started to go into it and waived it.
The Court: He may answer.
Mr. Giddings: An exception.

A. The note that the Commercial Savings Bank held against the Company?

Q. No, against Fred C. Henry for $2,500, upon which we have shown here those checks, last night and this morning, that those checks were paid?

A. I don't remember anything about it. I might have known it and forgotten it. I don't remember whether the checks shown here payable to Henry Tuger came through the Commercial Savings Bank, or were presented to our bank; if they had been presented to the Commercial Savings Bank, it would stamp them, and if they were stamped that way they were presented there.

Q. Didn't you understand during 1907-1908 and 1909 that Henry Tuger as a director of the Chemical Company had been called upon to furnish $2,500, for the company to do business on as a part of its working capital?

A. I don't remember; I might have known it and forgotten it.

Q. Didn't you understand further in that connection that
96 Henry Tuger let the company have $2,500, and put his own note for that amount in the Gratiot County State Bank, wasn't that your understanding of the situation at that time?

A. I understood that he let them have some money, but I don't remember where the note went, and my remembrance is that it was $2,500, I think it was. From what I can remember I then understood that these checks payable to his order that came to our bank in February and March, were repayments to him of money which he had let the Company have, or furnished for them. I didn't know anything about the arrangement that Henry Tuger had let them have that $2,500, because he was a director of the company, and that the company had required each one of its directors to furnish $2,500, as working capital.

Q. Leave out the word "know." I am asking for your understanding

A. I don't remember anything about that thing. I don't remember how long it was before they began to pay money to Henry Tuger that I understood that he let them have the $2,500; I think it was some little time before. I don't remember of any note or check or payment by the chemical company to Henry Tuger going through our bank until the fore part of the year 1909; I have no recollection of any such only as the checks show here; I didn't know anything about any previous payments. I knew during that time that Bayard A. Church was a stockholder in the Chemical Company.

Q. You knew during that time that A. B. Darragh was both a bondholder and stockholder, or was he just a bondholder in the Chemical Company?

A. I don't remember.

Q. You knew he held a bond in the company, did you not?
97 A. My remembrance was that he did.

Q. And was it also your understanding that he was a stockholder in the Company during the years 1907, 1908 and 1909?

A. Yes, I think so, and during that time he was president of our bank; I think Bayard A. Church was a stockholder in the company during that time; and from that time down to the time the company went out of business; during all of that time Church was cashier of our bank; I do not think that either Darragh or Church during that time were directors in the company; Harrison and Tuger were the only directors during that time in our bank that were directors in the company; I knew William Hugh, a few years before his death; he lived at Morley, near Big Rapids; I think he was a director in the chemical company during the years 1907-1908 and 1909; and during that time I saw him at Louis from time to time in connection with the affairs of the Chem-

ical Company; I never talked with him or anybody much about the Chemical Company.

Q. I call your attention to the entry upon your collection register, being number 15,080, and ask you if that note with that number was not the note of the St. Louis Chemical Company running to Henry Tuger upon which these payments by the checks which have been offered in evidence as drawn to Henry Tuger were endorsed from time to time as he received them from the Chemical Company and turned them over to the bank?

A. I think it is; yes, sir.

Mr. Lyon: I now offer in evidence from the collection register of the bank the following: No protest; date, September 28th, 1908; payer, St. Louis Chemical Company; where payable, here; owner, H. J. Tuger, St. Louis, Mich.; our number, 15,080; amount, $2,500; when due, January 28th, 1909; $58.34 paid on interest to
98 January 25th, 1909, February 5th, 1909; $200 on principal, paid February 27th, 1909; $100 paid on principal, March 5th, 1909; $200 paid on principal March 8th, 1909; $200 on principal paid March 12th, 1909; $300 on principal paid March 13th, 1909; $300 on principal paid March 15th, 1909.

Q. Isn't it a fact that your bank held Henry Tuger's note for $2,500, during all this time, as well as held the $2,500, of the Chemical Company note, payable to Henry Tuger for collection, and as payments were made on the Chemical Company note you applied them upon that note, and in turn applied them upon Henry Tuger's note which you held against him?

A. The records show that we held this for collection for Henry Tuger. I think at the same time we held a note of like amount against Henry Tuger; and my remembrance is, that from time to time as those amounts were paid by the St. Louis Chemical Company to Henry Tuger, and by him turned over to the bank we applied them upon this note which Henry Tuger held against the Chemical Company, and in turn applied them upon the note which we held against Henry Tuger for the same amount.

Q. Isn't it also the case that you understood at that time that Henry Tuger held as collateral security upon this note of $2,500 which he held against the Chemical Company, a part of the $44,000 of bonds?

A. That I don't know; whether he did or not.

The Court: We have this same trouble all of the time. Mr. Lyon will ask you if you didn't understand a certain thing, and you say you don't know it. Did you understand that to be the case?

A. No, I didn't know.

The Court: Don't you understand my language? I just said you should not answer whether you knew or not. He asked did
99 you so understand it. Answer that question yes or no, not whether you knew it or not. Did you understand it that way or didn't you?

A. No.

Q. Didn't you understand that when Henry Tuger put his own

note of $2,500 into your bank that he had as security to himself a note of like amount given to him by the Chemical company which he left in your bank for collection?

A. Yes, sir, I would have to know that if he left it there.

Q. Didn't you know the rest of it also?

A. No, sir; I don't think I did. At the time it might have occurred to me that there was some connection between these two notes, Henry Tuger's note of $2,500 was in our bank from some time in 1907, and was renewed from time to time; but I cannot remember that each time when he renewed it he left another note of the Chemical Company for collection. When these payments were made on the $2,500 note from the Chemical Company to Henry Tuger, I made two of the entries on the collection register, and Mr. Church made five of them; I made the one of $100 on March 5th, 1909, and $200 on March 8th, 1909. I think Henry Tuger himself brought to our bank the two checks of those dates and of that amount and asked us to apply them upon his note which he held against the Chemical Company.

Q. Didn't you understand at that time and before that time, that Henry Tuger had part of that $44,000 of bonds as collateral security for this note which he held against this company the same as you had as collateral security to your note?

A. No, sir, I don't think I knew what Henry Tuger had at all; I knew what we had, but I don't think I understand what he had at all. I know Cass Wright; I have known him a few years; I
100 have understood that he was one of the directors of the Chemical Company; and I understood that for years; I think he lived at Greenville.

Q. Did you meet him from time to time as he would come to St. Louis to attend the business of the St. Louis Chemical Company?

A. I think I have seen him, yes. I never talked with him about the affairs of the company; I did not know whether he was upon any of the paper of the company as guarantor.

Q. Did you know of the Stanton Bank holding paper against the company. You did, I take it?

A. The checks would show it, yes.

Q. You understood from time to time as these checks were put into your bank to buy drafts, that these drafts were to go to that bank in part payment upon a note or notes held by it against this company—Chemical Company—did you not?

A. That was the supposition; yes, sir; that was my understanding. I did not know whether any of the Chemical Company directors was back of that paper, if any one was. I never made any enquiry to ascertain whether or not that bank held stock of the company as collateral to its note as our bank did ours. I know Charles H. La Flamboy, one of the directors of the company; I also knew that at one time he was director of the Stanton Bank, but I don't remember the dates; during 1907-1908 and 1909 his home was in St. Louis. I knew John W. Pfeffler; he lived at Elmore; I understood that he was a director of the chemical company, but I don't know at what dates; I think he was from the time of the reorganization of the

company down to the time it went out of business. I didn't understand that he and Pfeffler were upon that Stanton paper; I
101 don't know anything about it; I didn't understand that some of the directors were back of all this paper that was borrowed from these banks; I knew nothing in reference to the Old National Bank of Grand Rapids paper; I supposed it had paper against the company by the checks here, I so understood at the time.

Q. Had you any reason for thinking that these banks didn't have bonds and guarantors back of their paper the same as you had back of yours?

Mr. Stone: I object to that as immaterial.

The Court: He may answer.

Mr. Stone: An exception. The reason for that objection is, because I don't think it is proper to show by a witness that because he didn't have reason to think something, that of course carries notice with it.

The Court: It would not carry any notice. It is proper cross-examination.

Mr. Lyon: I didn't say it did.

Mr. Stone: An exception.

A. No, I had no reason to believe they did or didn't.

Q. Didn't you suppose during all of that time that the other banks stood in the same relation to this Chemical Company that your bank did, namely, that they had stocks up as collateral and somebody back of their paper?

A. I might have supposed so; I don't remember; I have no recollection about that either way.

Q. Did you know of anybody outside of the banks having any bonds of the Company as collateral security to any paper held by them during this time?

A. Did I? No.

Q. Did you know of anybody outside of the banks having anybody as guarantor of their paper?

A. No. I don't remember whether or not Mr. Darragh had anything to do with the active management of the bank, during
102 the last half of the year 1908 and the first four months of 1909, or was away on his Congressional duties during that time.

Q. I call your attention to Exhibit C-2 and ask you to refer to that and tell me whether or not Mr. Darragh was in St. Louis during the year 1908 or the most of it?

A. No, he was not there according to the letter.

Q. After referring to Exhibit C-2 what do you say as to whether or not during 1908, according to your recollection, Mr. Darragh was in St. Louis, having charge of the affairs of the bank, or whether he was away from the city?

Mr. Stone: I object to his cross-examining the witness in this manner in relation to a paper without showing it to counsel.

The Court: I don't think it will do any harm to refresh his recollection about it.

Mr. Lyon: I will show it to counsel ultimately. I prefer not to do it until I examine Mr. Darragh, however.

The Court: He may answer.

Mr. Stone: An exception.

The Court: He is not cross-examining in regard to the contents of the paper. That won't do any harm.

Q. From that letter it would look as though he was in Washington?

The Court: Having looked at that what is your recollection now, as to whether he was in Washington, or in St. Louis if that refreshes your recollection any?

A. Why, I would think he was in Washington, but I don't have any recollection of it. I have no recollection of his taking any active part whatsoever in the management of the affairs of the bank during the last six months of the year 1908, or the first three months of 1909; it is my recollection that Bayard Church as
103 cashier and myself as assistant cashier, had charge of the affairs of the bank during that time. During that time the directors of our bank had from time to time meetings; I did not attend any of them; our bank kept a record of those meetings, and I have it here.

(Witness produces record.)

Q. Will you refer to it and tell me whether or not at any meeting during the last half of 1908 any proceedings or discussion was had by the directors, in reference to the St. Louis Chemical Company; I refer not only to that Company, but to any paper held by your bank, or Henry Tuger, or anybody else, a paper held against the St. Louis Chemical Company or its business affairs?

A. I don't see anything in the last half of 1908, no, sir. There was during the year 1909.

Q. Is that the only reference there that you call my attention to?

A. That is the first one I have struck; I will look further. I don't find any other and I have looked carefully enough so that I feel certain about it; I don't find any mention of anything.

Mr. Lyon: Any objection to my asking the witness a question which I don't care to spread upon the record?

Mr. McArthur: I don't see any objection.

(Mr. Lyon consults with the witness.)

Q. Did you not understand during the time these payments were being made through your bank by way of drafts to the Stanton Bank, that it held a note of $5,000 against this Chemical Company?

A. Why, yes, I think I remember that they had a note of that sort.

Q. You understood that for some time, did you not, before the Chemical Company began to make payments?

A. Yes, sir, I understood by the checks; by the checks that went

through our bank to pay the payments. I think I under-
104 stood since 1907 that the Stanton Bank had a note of $5,000 against this company; I had heard that William Hugh was a director of the Big Rapids bank that has been named; it is my impression that I understood that during this time we have been speaking about.

Mr. Giddings: We understand that all this is under our objection.

The Court: It may be so understood; perhaps you had better state the particular point of your objection.

Mr. Giddings: That it is not binding on the defendant as notice, on the question of notice or intention.

The Court: I think it is proper cross-examination. He may answer.

Mr. Giddings: An exception.

The Court: The objection may be considered to cover all of this class of testimony about the other banks.

Q. You understood, did you not, that William Hugh, Senior, held a note of $2,500 against this company which was paid upon from time to time through the Big Rapids Bank?

Mr. McArthur: The same objection.

The Court: The same ruling.

Mr. McArthur: An exception. This is just outside of the banks.

A. I understood it only by the checks that went, that was all. All that I know what they were for is by the notations on the checks.

Q. I call your attention to this note which appears in the files of the Security Savings Bank and Trust Co. suit, that has been referred to, and to the fact that that note is drawn upon a blank Gratiot County State Bank note.

Mr. Giddings: What note is that?

Mr. Lyon: It is a $2,500 note dated July 16th, 1909,
105 given by the St. Louis Chemical Company to William Hugh.

Q. In whose handwriting is the body of that note?

Mr. Giddings: We object to any examination regarding that note for the reasons already given; it is incompetent, immaterial and irrelevant.

Mr. McArthur: It is not a paper in evidence in this case.

The Court: He may answer.

Mr. McArthur: An exception.

A. It is my impression that William Hugh, Junior, wrote that note.

Q. Wasn't it drawn through your bank on one of your blanks?

A. I don't know. It looks like William Hugh, Senior's, indorsement on the back. It looks very much like the writing of D. E. Harrison, Vice-President, and L. B. Alger, Secretary, upon the note.

Q. I also call your attention to a $2,500 note payable to the Commercial Savings Bank at St. Louis, Michigan—from the same files—

and ask you if you recognize thereon the signature of Mr. Cocke, the President, and L. B. Alger, the Treasurer of the company?

A. That is Mr. Alger's.

Mr. McArthur: I desire the same objection to follow this paper without repeating it.

The Court: It may.

Mr. McArthur: An exception.

A. My impression is that it is Mr. Cocke's. It looks like Mr. Cocke's writing.

Q. I call your attention to a note here of $5,000, of April 18th, 1908, payable to Mrs. F. N. Wright at your Bank, and ask you if that note was not presented at your bank for payment?

A. I don't know.

106 Q. You knew of the existence of that note, or understood there was such a note out against the company during the time from the first of July down until after the time that the company went out of business?

Mr. Giddings: I object to that as immaterial and irrelevant.

The Court: The same ruling as before. He may answer.

Mr. Giddings: An exception.

A. No, I don't remember that I did; it is on one of our printed blanks; I don't recall that Mr. Wright obtained it from our bank to prepare the note; the handwriting in the body of the note looks like Mr. Alger's; I don't think I knew anything about Mrs. F. N. Wright holding a note against the company; I didn't understand that she held a note for a considerable amount against that company.

I have no recollection of it. I do not remember of seeing the annual report of the St. Louis Chemical Company showing the condition of its affairs at the end of the year 1908, at any time on or before the 31st of March, 1909; I am clear about it, I don't remember of ever seeing it. I don't think I saw any financial statement of the condition of the company at any time during that time. I cannot tell any more clearly than I did yesterday, how many notes were presented from the Commercial Savings Bank of our city to our bank, to be paid during the months of January, February and March, 1909, upon which payment was refused. I can not recall any piece of paper being presented from that bank to our bank and payment being made during that time. I don't remember any occasion where our bank received two payments upon our $5,000 note in one day, that on the same day our bank presented paper

107 to the company and it was refused. I don' remember it. I cannot remember when the guarantee that is referred to on our notes discount register, when that paper was delivered to either Mr. Harrison or Mr. Lowenstein. We have no record, that I know of, in our bank to show when it was delivered, further than the date of the final payment of the note; it would be according to our usual course of business to deliver it upon the day when the final payment was made, or substantially that time; when the

note was paid it belonged to them. I have no recollection nor anything to show when it was turned over to them; I don't think it was turned over before the note was paid that would not be according to our method of doing business.

Q. Going back to the question of the interest on those bonds of the company—the $56,000, was it your understanding that those bonds drew interest.

Mr. Giddings: I object to that as immaterial and irrelevant.

The Court: He may answer.

Mr. Giddings: An exception.

A. I didn't have any understanding of it at all.

Q. As an ordinary every day business man, you understood, did you not, that the bonds of that company drew interest payable either annually, semi-annually, or quarterly?

A. Most bonds do.

Q. You never knew any of that character but what did, did you, in your experience?

A. I cannot say that I did.

Q. Didn't you also know that these bonds drew semi-annual interest payable the first of June and the first of December?

A. No, I didn't know it.

Q. And did you not understand from and after the first of December, 1908, that the company hadn't been able to meet the interest upon its bonds which came due the first of June, nor
108 which came due the first of December that year?

A. I don't recall, Mr. Lyon; I don't remember.

Q. To refresh your recollection, weren't the interest coupons payable at your bank?

A. I don't remember as to that.

Q. You have no recollection of any interest coupons ever being placed in your bank for collection or for payment; what do you say as to that?

A. Not for a certainty, no.

Q. Do you recall now how many claims presented by your bank to the St. Louis Chemical Company for payment, between the 1st day of January and the 31st day of March, were refused by that company, and returned by you to the creditors?

A. No.

Q. Did you ever ask the company or any officer of it, why it was that they were paying you money from day to day upon your note, and turning down these outside claims?

A. No, sir.

Q. Did you ever know of the company making any claim as to any of these notes that went to protest, or drafts that were refused, that they didn't represent bona fide and fair indebtedness, that ought to be paid, as much as your bank debt ought to be paid?

A. I don't recall that I do.

Q. And did it not occur to you, Mr. Thedgar, that when this company was turning down, was refusing through your bank to pay outside claims, and on the same day making payment or pay-

ments to you, that it was preferring your bank to the other creditors, providing the other creditors had an equally honest claim against it?

A. No, sir. Such an idea did not occur to me.

Q. When this company twice in one day upon two sep-
109 arate occasions made two payments upon your note, didn't you ask them why they were so anxious to pay that up?

A. No, sir.

Q. You didn't ask them to make any of those payments on your paper?

A. Not that I recall. I have no knowledge of any request being made of the company to make any payments upon any of that paper, that was held by Tuger or any of these banks. No, sir.

Q. When the last payment was made on your note, so that the note was paid up what did you do with the bonds which you held as collateral? Turn them back to the company?

A. I don't know what was done with them.

Mr. Lyon: I think that is all.

Cross-examination.

By Mr. McArthur:

Q. Will you turn to your collection register. I think you have said that previous to the month of December, 1908, and for several months preceding that time, the Chemical Company did business in your bank?

A. Yes, sir. During all the time that they did business at our bank it has been a customary thing for drafts to come against them for collection, and for them to be returned; I cannot say for how long a period that has continued. We present drafts, and if they are refused we return them. We don't press for reasons as to why they are refused; if they make any explanation, we note it when we return it, if it is anything important. In the ordinary course of our business we handle collections of this kind against numerous other merchants in St. Louis; we do no collection business outside of St. Louis.

Q. Isn't it true that from your experience in banking
110 the merchants generally, against whom you have drafts for collection, refuse to pay those drafts even though they are known to be perfectly solvent; as to whether or not merchants of good standing generally in St. Louis turn down their drafts if that has been your experience?

A. Why, I should say that they refused more than they paid. They generally give several reasons; they say "will send check," "already paid," and sometimes will say just "refused"; sometimes they say "amount not correct." When these collection items that have been referred to in evidence came to our bank, and were sent back, I understood, and had in mind that they might have been refused for any of these reasons.

Q. Turning to your collection register, Mr. Lyon has called your attention to four drafts or collection items, which were returned

by the chemical company or returned by you during the month of December, 1908. I wish you would state to the jury whether during that month any items of collection were sent to your bank against the chemical company which were paid and remitted for.

A. Yes, sir. They are at sight and as follows:

Date of draft, Nov. 30th, 1908; owner, Cleveland National Bank, Cleveland, Ohio; amount, $659.26; paid Dec. 21st, 1908.

Date of draft, Dec. 16th, 1908; Cleveland National Bank; amount, $671.25; paid Dec. 23d, 1908.

By paid I mean the date it was paid by the Chemical Company.

Date of draft Dec. 23d, 1908; Cleveland National Bank; amount, $671.25; paid Jan. 2d, 1909.

Date of draft, Jan. 1st, 1909; Cleveland National Bank; amount, $559.38; paid Jan. 11th, 1909.

Date of draft, Jan. 18th, 1909; Cleveland National Bank; amount, $559.38; paid Jan. 28th, 1909.

111 Date of draft, Jan. 27th, 1909; owner, First National Bank, Omaha, Neb.; amount, $202; paid Feb. 5th, 1909.

Date of draft, November 28th, 1908; Cleveland National Bank; amount, $559.38; paid December 12th, 1908.

Date of draft, November 20th, 1908; Cleveland National Bank; amount, $671.25; paid December 12th, 1908.

Date of draft, November 18th, 1908; owner, Cleveland National Bank; amount, $559.38; paid November 30th, 1908.

Date of instrument, November 12th, 1908; Geo. J. Roberts & Co., Dayton, O.; amount, $10.80; paid November 14th, 1908.

Date of instrument, October 20th, 1908; owner, Cleveland National Bank; amount, $671.25; paid November 12th, 1908.

Date of instrument, October 15th, 1908; owner, Cleveland National Bank; amount, $671.25; paid October 26th, 1908.

Date of instrument, September 19th, 1908; owner, Bankers' National Bank, Chicago, Ill.; amount, $247.26; due October 15th, 1908; paid October 16th, 1908.

Date of instrument, October 8th, 1908; owner, Cleveland National Bank; amount, $671.25; paid October 16th, 1908.

Date of instrument, September 11th, 1908; owner, Cleveland National Bank; amount, $2,685.09; paid September 17th, 1908.

Date of instrument, September 9th, 1908; owner, Cleveland National Bank; amount, $402.75; paid September 11th, 1908.

Date of instrument, August 15th, 1908; owner, Cleveland National Bank; amount, $1,118.75; paid August 19th, 1908.

Date of instrument, — 7th, 1908; owner, Cleveland National
112 Bank and Union Sulphur Co.; amount, $559.38; paid August 12th, 1908.

Date of instrument, August 1st, 1908; owner, Cleveland National Bank; amount, $671.25; paid August 5th, 1908.

Date of instrument, July 14th, 1908; owner, Cleveland National Bank; amount, $1,342.50; paid July 16th, 1908.

Q. It appears from the collection register which has been offered in evidence here that from July 1st, 1908, up to and including the month of March, 1909, of the collections that has been sent to your

bank against the Chemical Company there has been $14,822.32 paid and $6,072.64 returned; and I want to ask you whether there was anything unusual in regard to these collections, or that did excite your suspicions as to the solvency of this company?

Mr. Lyon: I object to that as immaterial and also as incompetent, as it does not yet appear that that was the amount which was refused.

Mr. Stone: We can have the witness show that then.

Mr. Lyon: We have not gone into the amount of the paper that went to protest prior to December 1st when I commenced.

The Court: The ones they went over perhaps did not cover as much time as yours do. You may ask him that question, whether or not the transaction excited any attention or caused him to think of it.

Q. Was there anything about this transaction that excited your suspicions to the slightest degree as to the solvency of this company?

A. No, sir.

Q. It appears in evidence that on January 27th, 1909, a claim of $50 from the General Electric Co. was returned; what
113 was the balance of the Chemical Company in your bank on that day?

A. $420.68. On January 11th, 1909, the date the collection of $316.14 in favor of the Second National Bank was returned, their balance was $36.93.

On January 15th, 1909, being the date upon which the claim of A. J. Weeks of $144.60 was returned, the company's account was overdrawn $70.95.

On December 18th 1908, its balance was $1,137.94.

The balance on December 10th, 1908, when the Racine Knitting Co. claim of $36.16 was returned, was $603.76.

On December 7th, 1908, the date of the return of the collection of the Corn Exchange National Bank of $16.78, the Chemical Company were overdrawn $87.

On March 9th, 1909, when the Commercial Exchange National Bank collection of $17.05 was returned, its balance was $446.20; on March 20th, 1909, their balance was $286.84.

On April 2d, 1909, when the Chicago-Kenosha Hosiery Co. of $306 was returned, its balance was $99.10.

On March 30th, 1909, when the Wilbur Mercantile Agency collection of $49.64 was returned, its balance was $46.95.

(The bank's daily statement of the Chemical Company's account was here marked Defendant's Exhibit 1.)

Mr. McArthur: I offer in evidence the sheets numbered 1, 2, 3 and 4, which were marked Defendant's Exhibit 1, showing the account of the St. Louis Chemical Co. with the Gratiot County State Bank from June 30th, 1908, up to and including July 18th, 1911.

Mr. Lyon: No objection; the account should be stated; the account remained stationary from July 29th, 1909, at $410.30,

114 which was finally checked out on July 18th, 1911; isn't that right?

Mr. McArthur: That is right.

Mr. Lyon: That was the money that was turned over to the trustee; it will be conceded that.

Mr. McArthur: Yes, that is right.

(Witness withdrawn temporarily from the stand.)

FRED H. BERNARD, a witness produced and sworn on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. Bahlke:

I reside in St. Louis, Mich.; my business is bank cashier of the Commercial Savings Bank; I have been such cashier about seventeen years; I have the collection register of the Commercial Savings Bank during the years 1908-1909.

Q. Will you refer to that collection register during the months of December, 1908, January, February and March, April, May and June, 1909, and tell us if you can what collections, if any, you received on the St. Louis Chemical Co. during that time?

Mr. Stone: We object to that; the objection is that the books of the Commercial Savings Bank, transactions for which they are now asking, are not competent evidence with which to charge the defendant in this case, with any such liability as is mentioned and stated in their declaration.

Mr. McArthur: And as no notice to the defendant in this case.

The Court: What is the purpose of it?

Mr. Bahlke: The purpose of showing the presentation of only one note to the Gratiot County State Bank for payment during

115 that time, protested by the Commercial Savings Bank for non-payment after presented to the Gratiot County State Bank.

The Court: He may answer.

Mr. McArthur: An exception.

A. On December 10th, 1908, we received from the Metropolitan Trust Co. and Savings Bank a note on the St. Louis Chemical Co., dated Oct. 22, 1908, due in sixty days, $132.01, with interest at six per cent; paid December 22d, 1908.

On February 18th, 1909, we received from the National Bank of Commerce of Detroit, Mich., note on the St. Louis Chemical Co. Dated November 20th, 1908, due in ninety days, $550, interest at six per cent; item returned February 18th, 1909. It was protested for non-payment. It was payable at the Gratiot County State Bank, and we presented it there. I find no others up to July 1st, 1909.

Q. Did the Commercial Savings Bank have a note given by the St. Louis Chemical Co. during 1908 and 1909?

Mr. Stone: I object to that as immaterial in this case.

The Court: He may answer.
Mr. Stone: An exception.

A. We had a note of $2,500; I am not sure we had it at that time or not.

Q. I show you note bearing date July 18th, 1908, given by the St. Louis Chemical Co., by W. H. Cocke, president, and L. B. Alger, treasurer, payable on demand to the Commercial Savings Bank, $2,500, being a part of the files and records and proceedings of this court in the case of the Security Savings Bank and Trust Co., complainant, vs. The St. Louis Chemical Co., and ask you if that note was discounted at your bank?

A. It was; our bank held it approximately something
116 over two years. I think we took the note about the time it bears date; I don't remember to whom I delivered it.

Q. At the time that you took that note did you have any guarantee of payment from any other person or persons?

Mr. Stone: That is objected to as being immaterial and incompetent as well.
The Court: Oh, if it is a fact he may state it. It is a collateral matter. He may answer.
Mr. Stone: An exception.

A. We had the guarantee of an individual.
Q. Who was that individual?
A. Fred C. Henry.

Mr. Stone: The same objection.
The Court: The same ruling.
Mr. Stone: An exception.

Witness: I don't remember who made the arrangements at our bank for the discount of that note; I am not positive that the transaction was done by myself; I think I took the note in.

Q. How did it come, or explain to the jury how Fred C. Henry had become an endorser?

Mr. Stone: We object to that for the same reasons that we have urged as to the whole transaction.
The Court: He may answer.
Mr. Stone: An exception; he didn't endorse that paper, and if there is any endorsement it would appear there. They are seeking to show an endorsement by parole.
The Court: Ordinarily he could not do that, but when he is inquiring into a collateral matter, if he knows that Fred Henry was back of this paper, you use the word endorse in a broad sense. He may answer.
Mr. Stone An exception.

A. He didn't endorse the paper; there was no endorser on the paper.
117 Q. What was the arrangement you had with Fred C. Henry?

Mr. Stone: I want to ask a preliminary question.
The Court: You may.

Mr. Stone: Was that, whatever it was, in writing?
A. I think so.

Mr. Stone: I object to that as incompetent.
The Court: I think it is, when you ask for the contents of the writing.
Mr. Bahlke: Withdraw the question.

Witness: I don't remember what I done with the paper; I haven't it in the bank now that I know of. Our records will show when the note was paid—the balance was paid—to the bank. I don't think it will show to whom it was delivered.

The following payments were made and endorsed on the note: $87.50 interest to January 18th, 1908; August 19th, 1908, $87.50 interest to July 18th, 1908; February 8th, 1909, $87.50 interest to January 18th, 1909; $300 paid March 10th, 1909; $400 paid March 12th, 1909; $200 March 13th, 1909; $400 March 15th, 1909. They are all the endorsements that appear upon the note.

Q. Who paid the balance on the note?

Mr. Stone: I object to it as immaterial.
The Court: He may answer.
Mr. Stone: An exception.

A. Mr. F. C. Henry.

Mr. Stone: I move to strike it out; it is no evidence against the defendant in this case; there is nothing to show when it was paid.
The Court: The court does not hold that it is. I think it is competent testimony as bearing upon another branch of the case.
Mr. Stone: An exception.

Q. Previous to the payment of the balance of that note
118 by F. C. Henry, was the written instrument or guarantee or endorsement, to which you have referred, delivered to Mr. Henry?

A. I don't remember. I don't think our bank records will show when this note was delivered to F. C. Henry; I think they would show when the last payment was made by him; and it would show if the note had been checked off the discount register at the time it was paid.

At the time a note is paid it is our usual custom to deliver the note to the party who pays it. And if we hold any collateral security we usually deliver that at the same time. And until that time we retain it.

Q. Did you have any bonds of the St. Louis Chemical Co. collateral to the note to which you have made reference?
A. We did.

Mr. Stone: That is objected to as immaterial.
The Court: He may answer.
Mr. Stone: An exception.

Q. How many bonds?

Mr. Stone: An exception to this line of testimony.

The Court: Yes, all of it.

Q. What was the denomination of those bonds; I will withdraw the former question.

A. The note says five hundred dollars each, and that is my recollection of it.

Mr. Bahlke: I will offer in evidence this note.

(Note referred to was here marked Exhibit G-2.)

Mr. Stone: For what purpose?

Mr. Bahlke: For the purpose of proving the arrangement that we have already referred to repeatedly during the progress of this case.

Mr. Stone: We object to it as not being any step in any
119 arrangement that is binding upon the defendant in this case.

Mr. Lyon: This is binding upon the bankrupt; that is one branch of the case.

Mr. McArthur: Do I understand that in connection with it you are going to offer proof that there was such an arrangement?

Mr. Lyon: We have offered that already; we don't need to offer it any more. We may offer further proof. We have offered it by the statement of the company itself by its secretary.

The Court: Do you hold that the only class of evidence that could be offered here is on the question of notice? Can't they show evidence bearing on the question of preferential payments?

Mr. Stone: Yes, they may offer such evidence, but not by this class of testimony.

The Court: I think it is a proper question.

Mr. Stone: An exception.

(Mr. Bahlke reads Exhibit G-2 to the jury.)

Mr. Stone: Do I understand that the payments made upon this note is evidence to go to the jury as to the question of the intent on the part of the bankrupt or notice of any intent of the defendant in this case, or its reasonable cause to believe?

The Court: It is a question of whether they are put on inquiry.

Mr. Stone: The rule that applies is that they must have reasonable cause to believe.

The Court: What is reasonable cause to believe? Putting them on inquiry?

Mr. Stone: It cannot be merely suspicious circumstances that might place them upon inquiry, to charge them with notice of what they might have known.

The Court: Mere suspicious circumstances is not enough.
120 But there are two lines of cases, one where you put a man upon inquiry and charge him with knowledge; the other is where you have negotiable paper cases, where you have to go further and show mala-fides.

Mr. Stone: We claim that the rule in this case is that you have to show such notice, that it is actually fraudulent, an actual fraud to

take it under the circumstances that are present and of which they had knowledge.

The Court: You claim that simply putting them on notice is not enough.

Mr. Stone: No.

Mr. Bahlke: We claim that this is competent for both purposes, first to prove the furtherance of the arrangement made by the St. Louis Chemical Co. to prefer its creditors; and second, it bears directly on the question that the Gratiot County State Bank had probable notice to believe that a preference was intended, it being already in evidence here that the payments that were endorsed on this note were paid through the Gratiot County State Bank, directly connected in the entire transaction.

Mr. Stone: I want an objection put on the record that it is our claim that the mere fact of paying certain creditors at this time would not be an act of bankruptcy, without at the same time it is shown that they were insolvent.

The Court: It is not a question here of whether it is an act of bankruptcy; it is a question of whether it was a preferential payment. You may read the note.

Mr. Stone: An exception.

(Mr. Bahlke reads note, Exhibit G-2.)

Witness: I don't remember who brought to us the nine bonds described in the face of the note of July 18th, 1907.

121 Q. Did you have any conversation with Mr. Henry previous to the taking of this note July 18th, 1907, whereby he made arrangements with you for the purpose of having it discounted at your bank?

Mr. Stone: I object to that as leading and immaterial.

The Court: It is a little leading, but he may answer it.

Mr. Stone: An exception.

A. I think he asked us if we could handle a note of $2500 of the Chemical Company, with the bonds as collateral; that is my recollection. He said he would be willing to stand back of it. I don't know whether the Chemical Company or any of its officers arranged for it, or whether it was Mr. Henry. I don't remember that our bank demanded payment of the note from the Chemical Company.

I think Mr. Henry saw me with reference to the payment of the note at the time he took it up; I have no recollection other than that. I don't think that he saw me before March 10th, 1909, with reference to the payment of $300 on the note. I don't think we demanded payment of the $300 of the Chemical Company, and no member of the bank did to my knowledge.

I have no recollection that Mr. Henry saw me with reference to the $400 payment of March 12th, 1909, that was made upon this note; I do not know that any demand was made or letter written by our bank on or to the Chemical Company for any of them; I think they were paid by the company, and I don't know at whose suggestion. I am acquainted with Mr. Cocke, the president of the Chemical Company, and with Mr. Alger; they did not come to our bank very

often; I have no recollection of seeing them with reference to the payment of this note or any member connected with our bank doing so. I have no recollection or knowledge of any kind that will
122 enable me to tell at whose suggestion or direction the endorsements were made on this note during March, 1909. Some of the officers of the company, or their clerk, or somebody came in and made those endorsements; I don't know under what arrangements or anything about it; I don't remember of having any conversation with any of them at the time they made them with reference to when the balance would be paid upon the note; nor did any one connected with our bank that I know of; the payments would be made to anyone that happened to be at the window; I don't remember of being at the window; the endorsements, I think, all bear my signature. The paper was payable on demand and I do not recall that I demanded payment on the note from the Chemical Company at any time before these endorsements were made. I don't remember; I did not, that I know of.

Cross-examination.

By Mr. McArthur:

I have been cashier of our bank about seventeen years, and I am familiar with the drafts and collections that have come through our bank against local merchants; I could not say exactly, but I should say that about one-half of the collections that come to our bank against responsible parties in our vicinity are returned. They are often refused on account of amount being incorrect, or not being due, or difference of opinion, or they say will write, or something to that effect.

Q. I want to ask you if at any time previous to April 1st, 1909, you ever heard the financial standing and solvency of the St. Louis Chemical Company questioned.

Mr. Lyon: I object to that as immaterial. It could only be material in a case in which that bank is involved. It could not
123 be material in this case because there is no showing, no offer to show, that any information or want of information that this witness or this bank had was brought to the attention of the defendant bank.

Mr. McArthur: A man's solvency is not discussed; it is only when a person becomes insolvent that people talk about him. I submit we have a right to show that in banking circles in St. Louis there was never a breath of suspicion that there was anything wrong with this company until long after these payments were made.

The Court: Suppose some concern was hopelessly insolvent and kept it from all the world, and they had an excellent standing, and the trustees could make a showing that the party from whom he is seeking to recover a preference had reasonable cause to believe that; could you offset that by showing that any number, say one hundred other banking institutions in the city, believed, and didn't have any reason to believe but what the concern was entirely solvent? The Pittsburgh bank that failed a short time ago, for instance; it had the

best standing in the country; all the banks about the country supposed it was all right. It turned out to be insolvent. Suppose the trustee in that case was seeking to recover a preference; and he could show that the defendant in that case did have sufficient cause to suspect that that bank was insolvent. Could you rebut that by showing that one hundred other concerns never heard anything about their being insolvent?

Mr. McArthur: We simply claim that we have the right to show that in bank circles there was nothing to indicate that this company was insolvent as bearing upon the question of the good faith of the defendant in this case.

The Court: I think all you could show would be the gen-
124 eral reputation in the community. I don't know as you could show that, but I would think that would be the limit of it, anyway. I think I will exclude this question as to what he learned about it or thought about it.

Mr. McArthur: An exception.

Q. I will ask you whether during the months of January, February and March, 1909, you were acquainted to some extent with the property buildings and assets of the St. Louis Chemical Company.

A. Yes, I know something of the plant.

Q. Now I will ask you to describe their factory?

Mr. Lyon: I object to that as immaterial and also as incompetent, in view of the adjudication in the bankruptcy court, for the same reason as was urged when this line of questions was asked the other day.

The Court: The purpose of this, I suppose, is you want to raise the question of whether or not you can show actual insolvency.

Mr. McArthur: I offer to show by this witness the manner in which the company did business; that they had large factories, buildings that were very valuable; the extent of their assets and property, and all of those things, for three reasons, and I claim it is admissible for three reasons—first, that the company was not insolvent at the time that these payments were made; second, as bearing upon the intent of the bankrupt; upon that proposition I submit that the jury is in no position to pass upon the question of whether the bankrupt intended to give preferences unless it is permitted to take into consideration the property and assets of the company; and third, I claim the right to show it as bearing upon the question of the intent of the defendant in this case as to its knowledge in accepting the claimed preferences. That there may be no question as to
125 the purpose in offering it, I offer it under the rule laid down in the case of Kimmerle vs. Farr and for the reason there cited and discussed.

The Court: Kimmerle vs. Farr didn't pass upon the question that is now before the court; that is, this branch of it about disputing the adjudication in bankruptcy. I don't think you can do that. The only question is whether or not you may offer it for the other purposes to show the intent of the insolvent and on the other question of having cause to believe. What do you say to that, Mr. Lyon?

Mr. Lyon: I say as to that that any idea that this man may have had locked up in his mind as to the value of that property, unless it be brought home to the management and officials of the Chemical Company, cannot throw any light upon the question of their intent. It must depend upon their knowledge, their ideas and their acts, not upon some idea of somebody who is outside.

The Court: I will exclude the question, I think.

Mr. McArthur: An exception. That is all.

Redirect examination.

By Mr. Bahlke:

Q. By referring to your discount register can you tell when the balance of the note of July 18th, 1907, was paid?

A. April 1st, 1910; it was paid by Fred C. Henry; the amount was $1,200; we have no record of collaterals other than our discount register, that may be left with us. The payment of $1,200 was made to the bank; I can not recall to what person; the figures that appear on the discount register are the figures of our lady clerk—Jennie H. Skinner. Notes and collateral papers are generally delivered to the party that pays them or takes them up; I do not recall this
126 particular transaction of the note of Fred C. Henry but that would be the natural course.

Henry J. Tuger, a witness produced and sworn by the plaintiff, testified as follows:

Direct examination:

I reside at St. Louis, Mich.; am fifty-six years of age, and have lived at St. Louis forty-five years. My business is that of a general merchant, and have been individually engaged in that business for fifteen years, and was so engaged before that for a number of years with my father. I am a director of the Gratiot County State Bank, and have been for about fifteen years; during the years 1907, 1908 and 1909 I was on what we call the examining committee of the bank. The duties of this committee were from time to time to look over and carefully examine the books, records, discounts, and cash of the bank; I performed that duty from time to time in a way; we didn't examine everything, but in a general way went over it enough to satisfy ourselves as to the condition of the bank, and the paper that it held, and the payments that were being made; and that the cash of the bank that belonged there was there. During this same time I was a member of the board of directors of the St. Louis Chemical Company; I was such director from the time of its reorganization in 1907 down to the time that the company ceased to do business. During all that time Mr. Cocke was president of the company—W. H. Cocke. I knew him; I met him from time to time, and saw his handwriting but not enough to become familiar with it. The other members of the board of directors of the Chemical Company at the time of the re-organization were, Cass T. Wright, John W. Pfeifler, C. H. La Flamboy, D. E. Harrison, and F. C. Henry,

W. H. Cocke and William Hugh; there were nine. These men continued to be directors from that time down to the time the
127 company ceased operations, being re-elected and acting from year to year from that time on. From time to time during that time I attended meetings of the board of directors of the Gratiot County State Bank; I don't remember missing any; I think I was there most of the time; intended to attend them if I was in town; our regular meetings from the middle of 1907 down to the latter part of March, 1909, occurred once a month, but I am not positive that we always held a meeting; we held special meetings as occasion arose; I think I attended such meeting during the time mentioned as often as once a month, but I am not positive. I was equally careful to attend the meetings of the Chemical Company during that time whenever I was in town; I have no recollection of ever being absent from a regular meeting of the Chemical Company board of directors during that time. We had special meetings of the board of directors of the Chemical Company occasionally but how often I can not say; I attended the special as carefully as I did the other meetings.

Q. Now upon the re-organization of the St. Louis Chemical Co. in 1907, an arrangement was made by the directors, was it not, for raising capital for carrying on the business—working capital?

A. Yes, sir.

Q. And that arrangement was, was it not, that each of the ten directors was to see to the raising of $2,500 from time to time as needed to be used by the company as a working capital?

Mr. McArthur: I object to that as irrelevant and immaterial.

The Court: He may answer.

Mr. McArthur: An exception.

A. That is my understanding of it and was my understanding at the time; yes, sir.

128 Q. And in accordance with that arrangement you raised your $2,500, did you not, by putting this note that has been referred to in the Gratiot County State Bank—your own note—and letting the company have $2,500 in money?

Mr. McArthur: The same objection.

The Court: The same ruling.

A. I loaned the company $2,500 myself individually.

Q. And put your note for a like amount in the Gratiot County State Bank?

A. That had nothing to do with my loan of money to them.

The same day I loaned the Chemical Company the money, I borrowed a like amount of the Gratiot County State Bank; I transacted the business with the cashier of the bank, Mr. Church; I did not inform Mr. Church at that time that I was making the loan because I was loaning to the Chemical Company on that day $2,500, under the arrangement that each of the directors was to furnish that amount for working capital; I do not remember that I discussed that matter with Mr. Church at that time. The note I held against the

Chemical Company for that $2,500 was renewed from time to time and my note was also renewed, I think. The Chemical Company paid me interest on the note whenever they renewed it—seven per cent—I think; I think I paid six per cent on what I borrowed at that time; I think I had arrangements whereby I obtained my loans at six per cent. The Chemical Company paid me seven per cent. When I furnished the Chemical Company the $2,500, it was arranged that the Chemical Company was to put up nine bonds of $500 each, of the $44,000 of bonds that have been spoken of here to me as collateral security, and I received five of them at first, when I received the note in the first instance.

129 Mr. Giddings: May the record show that we object to all of this line of proof regarding Mr. Tuger's raising this money and the company putting up the bonds?

The Court: Yes, under the same objection.

Mr. McArthur: And the exception will follow?

The Court: Yes, sir.

Witness: I subsequently received the nine bonds. Perhaps four or five months afterward. I think the company furnished the other four bonds to me without my request. From that time on until after the petition in bankruptcy was filed I retained the nine bonds as collateral security to the note. When the directors were making the arrangement that each director was to furnish $2,500, there was nothing said as to where they were to get the money or where they were to secure it, or anything of the sort. I understood shortly after that, that Mr. Harrison and Mr. Lowenstein got their $2,500 each from our bank; and it was my understanding and that the Chemical Company gave its note for $5,000 payable to our bank and that Harrison and Lowenstein stood back of the note to the bank; I also understood that the Chemical Company put up a certain amount of this $44,000 as collateral to the note of $5,000; I don't remember of going through the loans as an examiner, at the time the note was in; I don't remember of doing it; we might not as the examining committee have gone over our loans in the bank during that time; it was part of our duty to do so and check over the paper of the bank as it appeared in the pocket book with our discount register to see if all the paper was there; I cannot recall that that paper ever passed through my hand; I made a certificate that I had gone over the paper in the bank among other things, and when I made that certificate I had helped to go over the paper in the bank and I certified to what I had done. During the
130 time the $5,000 note was there, I surely knew it was there, and I knew that our bank held a certain amount of the bonds of the Chemical Company as collateral security to that note; and I presume that I knew that our bank held as additional security the guaranty of Mr. Harrison and Mr. Lowenstein; I understood that it was guaranteed.

Q. You understood that that guarantee of Lowenstein and Harrison was to cover their $5,000 which they two were to raise, under

the arrangement that you directors were to raise $2,500 apiece as working capital for that company, did you not?

A. I was under that impression; I never asked them.

Q. That was your understanding of it?

A. Yes.

Witness: I understood that Fred C. Henry raised his $2,500 in the Commercial Savings Bank of St. Louis; I was informed that the Chemical Company note of $2,500 was put in the Commercial Savings Bank of St. Louis, and Fred C. Henry went back of the note; I never saw the note but I was so informed; I understood at that time that the company put up a portion of this $44,000 of bonds with the Commercial Savings Bank, or with Fred C. Henry as collateral security for this $2,500 note. William Hugh resided at Morley, near Big Rapids; I don't think I knew that he was a director of the Big Rapids Bank; I understood that he furnished his $2,500 himself; and I understood that he took the note of the Chemical Company for $2,500; and I understood at the time that he took as collateral security a part of this $44,000 of bonds; I understood that Cass T. Wright raised his share of $2,500 and received a portion of the $44,000 of bonds from the company as collateral security; I was so informed.

Mr. McArthur: I move to strike that out as hearsay.

131 The Court: No, it is a matter of whether he had knowledge or not.

Mr. Lyon: This is a question of intention of the Company.

The Court: It does not prove the fact as to whether it is true or not, but it bears on whether it came to his knowledge.

Mr. McArthur: Do I understand that proof of the company's intent to prefer is held by the court to be admissible?

The Court: I understand that is one of the things that they have to prove.

Mr. McArthur: That is as I understand it. They opened upon the theory that they expected to prove the intent of the company to prefer.

Witness: The question of where the various directors would furnish their respective amounts of $2,500 was not talked of in the directors' meeting of the directors of the Chemical Company; I don't think it was discussed there at any time as to where they had provided it; Cass T. Wright secured a loan for them outside of St. Louis; that was the Mrs. F. N. Wright $5,000; I don't know whether Cass Wright stood back of that himself or not; he procured it for the company; and I understood that the company gave Mrs. F. N. the $5,000 note that has been spoken of here as evidence of its debt to her of that amount; and that the company put up certain bonds of the company as collateral security to the note; these bonds being a part of the $44,000. Mr. La Flamboy lived at St. Louis, and he was here a part of the time and a part he was away; I did not know and I never knew that he was a director of the Savings Bank at Stanton; I never understood that he was; I did not know that he was a stockholder in that bank. Mr. Pfeitler lived at

Edmore; I did not know about Mr. Pfeitler and Mr. La
132 Flamboy arranging for a loan through the Stanton Savings Bank to cover the $5,000 which they were to raise as working capital for the company; I understood during that time that some of the directors had arranged for money from the Stanton Savings Bank; and I understood that the note of the Chemical Company was given to that bank with some of the directors back of it and the company put up bonds as collateral security to that note the same as in my case, and the same as in the others; I understood at that time that a part of that money was obtained from the Old National Bank at Grand Rapids, and that some director or officer of the company stood back of that, and that the company put up collateral security to that note; I didn't know what directors were back of that Old National Bank paper; I understood it was Pfeitler, La Flamboy and Mr. Cocke; I was of that opinion.

Q. What was your understanding as to who was back of the paper at the Stanton Bank?

A. I didn't know.

Q. Was it your understanding at the time, and during all the time that paper was out, that each of the directors performed his part of that arrangement, and let the company have or obtained through the bank the $2,500 that was assigned to him to raise as working capital?

Mr. McArthur: I object to that as immaterial, unless he shows how he understood it; we are entitled to know how the man understands.

Mr. Lyon: That would be a matter of cross-examination.

The Court: He may answer.

Mr. McArthur: An exception.

A. I was satisfied that each director was seeing that that much was provided in some manner.

133 Witness: I understood that the banks from which the money was obtained were the Gratiot County State Bank, the Commercial Savings Bank of St. Louis, the Old National Bank of Grand Rapids, and the Stanton Savings Bank; William Hugh and myself furnished them $2,500 each and that Cass T. Wright obtained from Mrs. F. N. Wright the loan for the company; I didn't know that anybody stood back of it; the money was not all obtained at one time; I would not know the order in which it was furnished by the various directors. I might have been instrumental in raising some of the first money. I loaned the $2,500 to them about a year previous to the time the last renewal came due.

Q. At any rate there came a time when the directors had furnished their respective shares which they were to furnish under that arrangement.

A. Yes, sir.

Q. And that paper or a portion of it remained unpaid in January, February, and March, 1909, didn't it?

A. Yes, sir.

Q. And it was your understanding that bonds of the company out of the $44,000 of bonds were put up as collateral to all of these moneys that were furnished either directly or indirectly by the directors?

A. Yes, sir.

Q. And there came a time, did there not, some time the latter part of 1908 or the fore part of 1909, when it was arranged by the directors of the Chemical Company to collect in moneys and pay off these notes, that you have just been speaking of and retire those bonds?

A. Well, possibly, I can't tell the date; either there was something of that sort; I presume it was about that time; when I say I presume so, I mean that is my best recollection. I can't tell the
134 exact date, I think it was about the month of December, 1908, or the month of January, 1909.

Q. Now, that was the arrangement made by the directors of that company, was it not?

A. It was discussed by the members, but no formal action was taken; I understood that they were going to follow out those lines though that is all that I know; that the company was going to pursue that course.

Q. And you understood that it started upon and continued that course, did you not?

A. I understood that they would, yes.

Q. And it was your understanding at the time, was it not, that when you received those checks——

Mr. Giddings (interrupting): I object to this line of testimony, I think our general objection covers it already, as not being notice to the bank or binding upon it.

Mr. Lyon: That is a question whether or not when a director participates in that, whether or not the bank has notice.

The Court: It is competent for some purpose. He may answer.

Mr. Giddings: An exception. Can we have an exception to all of this testimony?

The Court: All that class, yes.

Q. And you understood, did you not, that from time to time as you received payments on your note that these other notes secured by these bonds were being taken care of at the same time?

A. I didn't know exactly what they paid but I supposed that that was the case. That was my understanding; and that I understood was the course which the company had determined upon to pursue.

Q. And your understanding was, and is, is it not, that whenever the company made these payments in February and March, 1909 upon those notes that we have been referring to as being
135 secured by a part of the stock of $44,000, that those payments were being made by the company for the purpose of paying off and getting rid of those notes, and taking up the bonds collateral thereto?

A. Yes, sir.

Q. And it was also your understanding, was it not, that it was the purpose of the company and the intention of the company to pay off those debts as secured by those bonds and then go to the question of paying off the general unsecured creditors?

A. Yes, sir.

Q. Was a part of the policy of that company, was it not, at that time?

A. Yes, sir, as I understood it.

Q. And that was the way it was talked among the directors, was it not?

A. Yes, sir.

Q. And agreed upon by the directors?

A. Yes, sir—well, in a way.

Q. In an informal way?

A. Yes, sir; no formal agreement at all.

Q. What do you say as to whether or not that was the talk of the directors, that they would pursue that course?

A. Yes, sir. I mean that it was not in the form of a resolution and placed upon the record of the company, but it was agreed in a verbal way that that should be the policy of the company; there didn't anyone object that I remember of.

Q. And all the directors, as you recollect, consented to it?

A. If they were all there; I think they were at the time; I don't remember.

Q. And they approved of the following of that course, did they not?

136 A. Yes, sir.

Q. And it was in accordance with that arrangement, and that agreement, that the company was to pay off the notes secured by the bonds out of the $44,000 of bonds, that these various payments upon these notes secured by the bonds were made according to your understanding?

A. Yes, sir.

Q. And was there any talk there as to how long it would take to pay off those notes secured by those bonds, or how quick they expected to be able to do it?

A. I think there was; I cannot remember the talk now. It seems as if the management reported these things from time to time and explained to the board how we could wipe out this indebtedness.

Q. I notice here, by the evidence already in the case, that the Mrs. Wright note didn't get any payment upon it; do you know how that came to be overlooked?

A. No, sir.

Q. But the arrangement and policy of the company was to pay such amounts as would keep the payments about proportional upon each of the notes secured by the bonds, taking into consideration the amounts of the notes, was it not?

A. I don't remember that anything was said about that.

Q. But to pay them off in the same general way proportionate or otherwise from time to time until you got them retired?

A. Yes, sir.

Q. And take up those bonds?

A. Yes, sir.

Q. What do you say as to whether or not it was not also talked there that after you got those all retired and all paid off your company would then take up the problem of paying off the general creditors of the company?

137 A. Yes, sir.

Q. It was also reported to your board of directors, was it not, by the management of the company that they were refusing to pay outside claims for the purpose of using the money to pay off these notes secured by the bonds and retire the bonds.

A. I never knew anything about that.

Q. According to the course of your business it was up to the management to refuse payment of claims outside of these secured by the bonds, if anybody did, was it not?

A. Yes, sir.

Q. And your managers had the authority at that time to refuse payment of that outside paper if it was necessary to do it in order to speedily retire these notes secured by the bonds, was it not?

Mr. Giddings: I object to that as incompetent, immaterial and irrelevant; the by-laws are the laws governing the corporation, and would govern that.

Mr. Lyon: There is no presumption that they had any by-laws.

The Court: The same ruling I did yesterday. When you are inquiring into what amounts to fraud, actual or constructive, I understand you have the right to show what was done at the meetings whether it is upon the records or not, if that is what Mr. Lyon wants to get at.

Mr. Lyon: Sure.

The Court: I think he is entitled to do it; if he refers to the original authority that would not be the proper way to prove it. If he is asking about what they did in these latter days, he may answer.

Mr. Giddings: He didn't refer to any meeting.

The Court: No, but I understood that he referred to this time. He has been talking about this transaction. He may answer.

Mr. Giddings: An exception.

138 A. There was no special action of the board, or anything to authorize them to pay or not to pay.

Q. That is the suggestion of opposing counsel. I didn't say anything about that. Listen to my question and answer it.

Mr. McArthur: An exception to that remark.

(Last question read.)

A. As far as that is concerned, I don't know whether they had authority or not.

Q. You do know, however, that it was the understanding and agreement of the management of the company that first and foremost they were to pay off and retire those notes secured by these bonds, and then afterwaid try and take care of the general creditors?

A. That was the geneal understanding; yes, sir.

Q. Was that the general talk?

A. It was never talked, but the management proposed that, and it was acceptable to others.

Q. To the directors?

A. Yes, sir.

Q. And that was the policy that the company sought to carry out, was it not?

A. That was what I understood.

Mr. McArthur: I move that this be stricken out, all the testimony of this witness to what his understanding was of that conversation, for the reason that it appears in evidence that it was submitted by the management and accepted by the board, and the best and only proof is what he submitted and said, and what they said or did, or what action they may have taken, and that his opinions and conclusions as to that are not admissible.

Mr. Lyon: If counsel will wait a minute, I think I will make that so they won't have any exception to it.

139 The Court: It may stand as far as it has gone. He said it was talked.

Mr. McArthur: An exception.

Q. Who was the manager at that time?

A. Mr. Cocke was general manager and president.

Q. Whether or not he proposed to the board—said to the board—that it was his idea that the best thing to do was to collect in your assets as quickly as possible, pay off these notes secured by the bonds of the company and retire those bonds?

A. I think that was his suggestion; that was the substance of what he suggested to the board.

Q. And you say that the board fell in with that idea, and approved of it?

A. There was no objection to it raised. I understood that from that time on the company pursued that policy. I cannot fix the time that that arrangement was made.

Q. Was it your understanding that from that time on, or shortly after that time on, as you got the money, that your company began to make payments upon these notes secured by those bonds?

A. I think it was.

Q. In other words, your understanding is, that that arrangement was made before the company began to make these payments of January, February and March, upon these notes secured by these bonds?

Mr. Giddings: I object to that as assuming that an arrangement was made to that effect.

Mr. Lyon: I think I have pretty nearly satisfied this jury that an arrangement was made.

Mr. Giddings: And there is no evidence from this witness that any arrangement was made to that effect; he says that there was a certain tacit understanding in regard to that matter, but what the management did he don't know.

140 The Court: It don't make much difference what words you use; the gist of the witnesses' testimony is that the company took up that course of action; you can call it arrangement or understanding, or what you are a mind to.

Mr. Giddings: An exception.

A. Yes, sir.

Q. And your understanding also is, that payments made upon these notes during January, February and March, referring to the notes secured by the bonds, were made in pursuance of, and for the purpose of, carrying out that arrangement of the board of directors?

A. Yes, sir.

Q. Didn't you as a member of the examining committee of the Gratiot County State Bank go over the books of that company including its negotiable securities, after the time that your Chemical Company began to make these payments under that arrangement?

A. How long after?

Q. Any time after, and before the Gratiot County State Bank note of $5,000 was paid?

A. I don't think I did; I don't remember of it at all?

Q. Can you fix a time, if at all, after that time you examined the books of the Gratiot County State Bank as a member of the examining committee?

A. I think it would appear several months after that; I think we examined the books along about October, 1908; and next somewheres in the vicinity of six months after that; I don't think we examined them until some time in April, 1909; I could not tell the dates. There must be a copy of our report in the bank by which it can be definitely told whether I examined the books during the months of January, February or March; and before I come back I will ascertain whether I did do so.

Q. Did you as a director of the Gratiot County State Bank attend a meeting of the board of directors of that bank at any time

141 during the month of January, February, or March, 1909?

A. Why, I must have; I cannot remember, but I surely attended meetings at that time, that were held, and we must have held one at least once a month.

Witness: I received certain payments from time to time upon my note of $2,500 which I held against the Chemical Company.

Q. And have you with you a memorandum of the dates and the amounts that you received from the company?

A. I think so.

Q. Will you produce it, if you please, merely for the purpose of further examination?

A. That is, I could give it within a day.

(Producing book.)

I received a first payment on my note against the Chemical Company, $200, on February 26th or 27th, 1909, by check, payable to my order; I didn't request that or any of the payments. I supposed at the time that they were made to carry out the policy which had

been agreed upon to be carried out; that was my understanding; that is what I mean when I say I suppose so; the payments were made to me voluntarily; Mr. Alger brought the checks to me; I don't remember whether or not he told me, when he brought the first check, that he was starting in to help take care of my note. I don't know that he said anything about that they were taking care of those notes in accordance with that arrangement; I took the check and put it in the Gratiot County State Bank and told Mr. Church or Mr. Thedgar, and had it endorsed on the note of mine at the bank; I saw that it was made at the time I turned over the check; I think Mr. Alger delivered to me each one of the checks by which I received payments upon my note.

142 Q. You delivered the check each time to either Mr. Thedgar or Mr. Church, through the window?

A. I went to the bank with it and had it endorsed on notes that I was owing to the bank; I passed it through the window; I don't think I said anything to Mr. Church or Mr. Thedgar about I had received another payment upon my loan to the Chemical Company; I specified the note I wanted it endorsed upon; I specified the note, whatever it might have been; I didn't tell them it was the $2,500 growing out of the Chemical Company business; I didn't say anything about the Chemical Company business.

(Court here adjourned until next Tuesday morning, February 24th, 1914, at 9 o'clock a. m.)

HENRY J. TUGER resumed the stand for further examination.

Redirect examination.

By Mr. Lyon:

Witness: The regular and special meetings of the directors of the Chemical Company were held at the office of the company, on the Chemical Company grounds; Mr. Cocke was president and Mr. Alger secretary during the latter part of the time it was in business. I knew a young lady, Miss Noyes, who was stenographer there; I think she assisted in keeping the books; that was my understanding; the board did not meet right in the room where the young lady was working; we had a separate room; we would go through the room where she was working, the business office, to get to the room where we met.

Q. You and the other directors of the company had access to the books of the company, did you not, in case you cared to examine them?

A. I presume if we demanded it, we did.

143 Q. Nobody ever raised any objection to your examining any of the books?

A. I never asked to examine them myself.

Q. Nobody ever raised any objection to your examining?

A. No, nobody said I could not.

Q. They were in the room, the next room where you were there as a director transacting the business of the company?

A. Yes, sir.

Q. You had no reason to think that you could not examine them fully if you cared to?

A. No, I don't know that I did.

Mr. Giddings: It appearing from the witness that he didn't examine the books, the fact that he had an opportunity to do so, and did not examine them, we claim is immaterial and irrelevant, and we ask to have this testimony stricken out.

Mr. Lyon: I claim it was his duty and the duty of all the other directors to examine them and get familiar with the affairs of the company.

The Court: As a director of the Chemical Company?

Mr. Lyon: Certainly, a moral and legal duty they owed to the stockholders of the company while the company was solvent and to the creditors of the company when it became insolvent. We are trying to find enough to pay the creditors. The materiality of this testimony refers to the time when, under the decree of the bankruptcy court, this company was insolvent. This is going to the other question now, the question of the intent of the bankrupt and the directors of the bankrupt under 67-E.

Mr. Giddings: That could not apply if he didn't have any knowledge.

The Court: Those are two separate things. One of the
144 elements they have to prove is the intent of the bankrupt to prefer; another is reasonable cause to believe upon your part.

Mr. Giddings: Yes.

The Court: I don't understand that the proceedings in the United States Court settle the question of the intent to prefer, do you?

Mr. Giddings: No.

Mr. Lyon: I don't know but I am going further than I need to, because the decree in the United States Court does determine not only that this company was insolvent and for four months immediately preceding the time of filing the petition, but also determines that the directors of the company knew it.

Mr. Stone: That would not be res adjudicata, that would be entirely outside, it would not be necessary that they should know it.

Mr. Lyon: This question is competent as bearing on the question of the intention on the part of the bankrupt.

The Court: I think I will permit it for that purpose.

Mr. McArthur: It is submitted that upon the question of intent, the intent of the bankrupt can only be inferred from the things that he actually knew, from the things that were in his mind, that came to his attention, and I submit that any question of dereliction of duty as to things never brought to his attention can have no effect upon his intent at that time and would be wholly immaterial.

Mr. Lyon: That is true, but when you find day after day right in that office where the books are and where the people are who knew all about it, and you find as a matter of fact under the decree of the Federal Court that the company was bankrupt we have a right to ask this jury to draw some inferences where there is no objection to their full and thorough examination of the books.

145 The Court: You may proceed with this testimony.
Mr. McArthur: An exception.

Q. Since the adjournment of the other day have you ascertained when you, as a member of the examining committee of the defendant bank, made, if at all, an examination of the affairs of the bank during the first three months of 1909?

A. Yes, sir. December 10th, 1908, was the last in 1908; the report is signed by D. E. Harrison and myself.

Q. Mr. Harrison at that time was vice-president and one of the directors of the Chemical Company as well as a director of the Gratiot County State Bank?

A. He was.

Q. In making the examination at that time did you go over other books of the bank beside the discount register?

A. Why, we simply did all that was required of us; I presume we did; I don't remember.

Q. Did you go over the collection register of the bank?

A. I don't know; we checked up the loans to see that they compared with the notes in the pocket book; I don't know that in our usual course we would also go over the collection register; I do not think we would also go over any book indicating the source of all the income of the bank; my attention was not called in the latter part of 1908 and fore part of 1909, as a director of the bank to the fact that the Chemical Company was letting a lot of paper go to protest through the bank; or that it was refusing a lot of paper; I don't know anything about it; that was a matter that the directors left entirely to the management of the concern.

Q. Whether or not you were familiar enough with the methods of the Chemical Company in doing business through the bank so that you can throw any light on these drafts which were drawn
146 and paid through the bank in the latter half of 1908, in favor of the Cleveland National Bank?

A. No, sir, I don't know anything about those. I never knew whether or not the Chemical Company during the last half of 1908 was accustomed to buy goods with sight draft drawn through the bank, which the company had to pay before it could get the goods; and as a director of the Gratiot County State Bank I did not learn that that was a fact during that time; had no information on that subject; I cannot remember what the Chemical Company bought; what kind of stuff; I gave little attention to that. I knew that the $56,000 mortgage remained upon the Chemical Company plant during the months of December, 1908, and January, February and March, 1909, as security for the $56,000 of bonds; I held some of the bonds; I cannot remember the dates the interest fell due on the bonds, but it was semi-annually; I think and understood at the time that they wrote to all the bondholders requesting that the first interest payment of 1908 be passed; I think that was the one; I am not positive; I presume I received one of the letters as a bondholder; I haven't the letter that I received; I didn't keep it.

(A letter was here marked Exhibit H-2.)

Q. Look over Exhibit H-2, purporting to be a letter written to Charles T. Babcock, of St. Johns, Mich., and say if that is a copy of the letter you received?

A. It is my best recollection that that is a copy of the letter. I cannot positively remember; I do not recognize the handwriting at the bottom of the letter; but according to my best recollection that is a copy of the letter which I received; I presume it was signed by some officer of the company; that is my recollection; as I understood at the time, that letter was sent to all of the bondholders.

Q. Isn't it your recollection that the company didn't meet
147 the interest which came due in the year 1908 upon this $56,000 of bonds?

Mr. McArthur: We object to the testimony as immaterial for the purpose of showing insolvency or acts of insolvency on the part of the defendant.

Mr. Lyon: We are not offering it for that purpose. We are offering it for the purpose of showing knowledge on the part of the director, to be followed up by knowledge upon the part of other directors as bearing upon the intent of the company in making these preferential payments.

Mr. McArthur: We object to it as not being evidence of any intent on the part of the bankrupt to prefer the defendant in these payments, or that the bankrupt at the time thought they were insolvent or unable to pay their debts.

The Court: I think that all the arrangements that they made or attempted to make with the creditors about their debts would be proper to be gone into on the question of intent.

Mr. McArthur: An exception.

Mr. Lyon: In connection with the cross-examination I offer in evidence Exhibit H-2.

Mr. McArthur: There is nothing to show that such a letter was in fact ever sent.

Mr. Lyon: We have the testimony of the witness tending to show that fact.

The Court: Do you expect to make any showing as to where this copy came from.

Mr. Stone: This copy has no signature.

Mr. Lyon: I propose to follow it up by showing that it was what it purports to be, an office copy taken from the files of the St. Louis Chemical Company.

The Court: With that offer I will admit it.

Mr. McArthur: An exception.

148 (Mr. Lyon reads Exhibit H-2.)

Mr. Lyon: At the suggestion of counsel I state that the only purpose of offering this testimony is for such light as it may throw upon the action of the corporation in making the preferential payments, about which we are complaining in this case.

Mr. McArthur: We move to strike this letter from the record—we say that there is nothing in the letter to show any acknowledgment of insolvency on the part of the company, or any intent on the part of the company to make preferential payments complained of

here and it is therefore immaterial for the purpose for which it is offered.

The Court: I think I will permit it for the purpose for which it is offered.

Mr. McArthur: An exception.

Mr. Stone: We will admit that Charles T. Babcock of St. Johns, Mich., was a bondholder of the Chemical Company during all that time.

Witness: I think I was present at the regular quarterly meeting of the board of directors held November 30th, 1908, seven of the nine directors being present; there was a report by the officers of the company given out verbally; the condition of the company financially and otherwise was carefully considered and gone over at that time, I believe; it is my recollection that at least one installment of interest if not two installments were passed by our company before it went out of business; and I think these installments of interest remained unpaid until after the time that the company made these payments that are complained of in this suit. That is the fact.

149 Cross-examination.

By Mr. Stone:

Witness: The affairs of the company were managed by a board of directors, and continued to be all the time that the company was doing business.

Q. I notice that in your testimony that you gave on Friday last this question was asked you, and you gave this answer: "Q. You do know, however, that it was the understanding and agreement of the board and the understanding and agreement of the management of the company, that first and foremost they were to pay off and retire these notes secured by these bonds, and then afterwards try and take care of the general creditors?" And your answer was: "A. That was the general understanding, yes, sir."

Now state what, if anything was said by the board as to simply trying to take care of their other indebtedness?

A. Why, the statements made by the officers in charge—that was the general manager and the secretary-treasurer were to the effect—statements given out—that we could undoubtedly by careful management pay off the entire indebtedness, beginning first with the secured, and retiring that first and then as rapidly as possible the balance; I never heard any doubts expressed in the directors' meetings at that time or during the first three months of 1909 but what the company was able to take care of all their indebtedness; at this time the $44,000 of bonds that were collateral to these notes were regarded the same as the other bonds, as an obligation of the company, that is, providing they were sold or became in the possession of any other person; they were regarded in the hands of the banks to whom they had been pledged as collateral as equally as

150 valid, and equally as well secured by the mortgage as any of the $56,000 of bonds; they certainly were; the first time I knew of any doubts being expressed on that proposition was when proceedings were had in this court to determine how the proceeds of

the foreclosure should be distributed; and up to that time these bonds had been regarded by all the parties interested in them as being equally as valid as the $56,000 of bonds; I was a member of the company at the time that the mortgage was given.

Mr. Lyon: We offer in evidence the mortgage in question, recorded on the 20th day of May, 1905, in liber 111 of Mortgages, pages 542 and others, in the office of Register of Deeds of this County.

Mr. Stone: We have no objection. Will you concede that the whole issue of $100,000 of bonds was certified to by the trustee?

Mr. Lyon: Yes.

Mr. Stone: I concede that a copy of this mortgage was placed on file in the office of the city clerk of St. Louis at about the time it was filed in the Register of Deeds office and that it was kept renewed from time to time up to and after the time of the foreclosure proceedings.

Mr. Lyon: In that connection I offer in evidence the entire files in the chancery case referred to for the purpose of showing that the court had jurisdiction of the subject matter and the parties.

Mr. Stone: No objection.

Examination resumed by Mr. Stone:

Witness: I was the owner of five bonds of the $56,000 issue, of the face value of $500 each; and I also held as collateral to the obligation that the Chemical Company gave me nine of the bonds of the $44,000 of bonds; I was a member of the St. Louis Chemical Company when it was a New Jersey corporation, and a director; a
151 portion of these $44,000 of bonds were pledged by the New Jersey corporation to the Old National Bank of Grand Rapids to secure the paper of the New Jersey corporation; at the time of the re-organization of the New Jersey corporation into the Michigan corporation I think these bonds were still in the hands of the Old National Bank of Grand Rapids as originally placed there; the obligations of the New Jersey corporation to the Old National Bank were not paid at the time of the reorganization of the new company, and retired, and the bonds remained there, as I understand it; I do not remember how many bonds the Old National Bank held; the amount of the indebtedness of the New Jersey corporation to the Old National Bank was, I think, around $15,000 or $20,000, and I think the amount of the bonds pledged to it were in excess of the amount of indebtedness.

All of foregoing testimony as to bonds pledged to Old National Bank objected to as immaterial and as covered by decree of this court holding the $44,000 of bonds invalid and taken under exception.

This letter of December 8th, sets forth truly and substantially, as near as I can remember, what was talked at the meeting of the Board of Directors of November 30th, 1908, and states the true reason as was understood there by all of us as to why we had to pass the interest on the bonds; that was my understanding of it at that time, and the understanding so far as I know of the other directors

present. At this time in November it was my belief that the company had sufficient property at a fair valuation to pay all its debts; and I know of no other belief on the part of any of the Board of Directors of the company at that time; in the months of February and March succeeding this November, 1908, we had the same property that we had in this November unless some of the manufactured product that had been disposed of, and except as sold in the
152 regular course of business; we had the plant in practically the same condition, as near as I can remember, and the same products, except such as had been sold in the regular course of business.

Q. Now you may state if you will whether or not during the months of February and March, 1909, the company had sufficient property at a fair valuation to pay all its indebtedness.

Mr. Lyon: I object to that as immaterial and incompetent for the reason that it is attempting to re-try an issue adjudicated in Federal Court which is binding not only upon the company but upon this man as a director and a stockholder in the company.

The Court: Yes, I think as to the fact of insolvency I will hold that the judgment of the United States Court is res adjudicata.

Mr. Stone: May we not show what the condition of affairs was as bearing upon the intent of the bankrupt at that time?

Mr. Lyon: A court of competent jurisdiction has already determined what the state of affairs was, and that was that they were insolvent.

The Court: I don't think you can open up the question of whether or not they were in fact insolvent; I have not ruled yet on the other question on whether you may show what they thought or believed. I sustain the objection to the question.

Mr. Stone: An exception.

Witness: The Gratiot County State Bank was the general depositary of the company during all the time it was in operation in St. Louis, and remained its general depositary, and the money of the company was deposited there during all the time it was in busi-
ness, upon open account, in the ordinary way, as far as I
153 know, and checks were made upon the bank for what the company paid out; and so far as I know the money that was placed in the bank during the months of January, February and March, 1909, was placed there in the same manner that it had been during all the time that the company were doing business; I never knew anything to the contrary, or ever heard or had any understanding as to their being any change in their custom in that regard.

Annual report was here marked Exhibit 2.

Q. I show you Exhibit 2, which purports to be the annual report of your company filed April 21st, 1909, showing the condition of its affairs on the 31st of December, 1908, and ask you if you recognize it?

A. Yes, sir; that is my signature attached to it, and the other signatures were of directors of the Chemical Company.

Q. State whether at the time of the making and filing of this report it showed a fair and true history of the condition of the company as therein set forth on the 31st day of December, 1908?

A. It did to the best of my knowledge.

Mr. Stone: We offer in evidence as part of the cross-examination, Exhibit 2.

Exhibit 2 read to the jury.

Mr. McArthur: The shares were of the par value of $10.00 each.

Mr. Lyon: Will it be conceded that this was filed in the office of the Secretary of State on February 24th, 1909?

Mr. Stone: Yes, sir.

Q. Please state whether or not to your knowledge there was any change, and if so, what change in the condition of the com-
154 pany and its assets between the date of this report and the 31st day of March following?

Mr. Lyon: I object to it as immaterial to any issue here.

The Court: It may bear upon this question of the intent of the company. I will permit it for that purpose.

A. None that I know of. During this interval stock that we had on hand was sold in the regular course of business, and I believe materials were purchased during that time, and labor, and the proceeds of the sales of stock that was sold, was placed in the bank in the ordinary course of business, I suppose; I had no personal knowledge, but that was my understanding, that it was; during that interval I do not remember that any fires or calamities or anything of that sort occurred to reduce our assets, and I think I would remember it if there had; and during this interval I supposed that the moneys that were received from the sales of products of the company was checked out in the ordinary way to pay the debts of the company; I had no absolute knowledge; I had knowledge of what they were paying me, on what they were owing me, and I presumed they were paying others; I understood they were, but I did not know just what or who. As I remember it, we operated the plant in February and possibly a part of March; I am not sure just when we closed the plant down; during the time from December 31st, 1908, to the time that the plant was closed down, during that time I had some knowledge that they were employing labor buying material, and selling products in the ordinary course of business.

Q. Did you at that time, or have you at any time since discovered or found any reason to believe but what the moneys that were taken in in the ordinary course of business were used in the
155 payment of debts, expenses and labor?

Mr. Lyon: I object to it as clearly incompetent.

The Court: Sustained as the question stands. What he has found out since this transaction was all over is not of any importance. That would be a question for the jury but he cannot give his conclusion on it.

Mr. Stone: An exception.

Q. Did you ever have any understanding to the contrary?

A. No money had been paid out to my knowledge otherwise than for those purposes.

Witness: I know of the locality of St. Louis being visited by a cyclone, and I believe it was about the second day of July, 1909.

Q. What did the wind storm, or cyclone do to the Chemical Company plant?

Mr. Lyon: We object to that for the reason that it has been judicially determined by a court of competent jurisdiction that from and including the 26th of February, 1909, and down to and including the 25th day of June, 1909, this company was insolvent; after that time it is immaterial to any question in this case.

Mr. Stone: The purpose of it is to show that before these schedules were made, that have been offered in evidence here, that this plant had been largely destroyed, and that these schedules were made after that destruction.

The Court: What do your schedules show; do your schedules cover this property that they are talking about now?

Mr. Lyon: No.

Mr. McArthur: The schedules show that there was not anything after the adjudication. For some reason they have sought to put before the jury a list of their debts, and a showing by the
156 schedules, of substantially no assets—$490 total assets of the company. They have undertaken to show the condition of this company and have now before the jury the condition of this company two years after this time, and we offer to show that that is accounted for, by the fact that the property was blown down or materially injured and destroyed by a cyclone, and that was followed by a foreclosure.

The Court: Your purpose is to show that the United States Court in Bankruptcy made a wrong judgment and you wish to offer testimony to show that it is wrong.

Mr. McArthur: The purpose is to explain the schedules in bankruptcy.

The Court: To show that they were not insolvent?

Mr. McArthur: No, it is important as bearing upon all three elements, on the question of intent. If the jury was to assume without any explanation that there was not a dollar of assets there, they will be very likely to draw some inferences as to what was in the mind of the company.

Mr. Lyon: One thing that the plaintiff has to show in this case is that there is no property to pay the unsecured creditors, and that it is necessary to bring this suit in order to get money to pay them; that was the purpose for which these schedules were introduced in this case.

Those schedules don't include the property here which was taken by this foreclosure prior to that time, so that that is not available to pay debts with. There is no question about that fact, is there?

Mr. McArthur: What is the date of your schedule?

Mr. Lyon: The schedules were filed June 20th, 1911.

The Court: If the court is correct in holding that the adjudica-

tion in bankruptcy is conclusive as to the question of insolvency during the four months, then must you not limit all that testimony as to good faith or whatever you are a mind to call it,
157 the testimony bearing upon the question of whether they had reasonable cause to believe or not up to the date of the last transaction in this lawsuit? Can the court receive any testimony as to the condition of the property or anything of that kind after the time of this transaction as bearing upon good faith?

Mr. McArthur: That was our view of it when we objected to those subsequent schedules.

The Court: The court has not told the jury for what purpose, if at all, they could consider the schedules, and I expressly so ruled at the time they were introduced.

The courts have held that it is entirely proper to introduce the schedules for the purpose of making proof of one of the elements they have to prove, but the court does not hold that the schedules could be received as bearing upon the question of intent and the cause to believe upon their part. Wouldn't it be a good plan to start in right here and assume—you have your ruling on it, I don't think the court will change it during this trial—that you cannot controvert the finding of the United States Court as to acts of insolvency, but that you may show the condition of affairs there—the buildings and things, and property they had a bearing upon the question reasonable cause to believe, but that cannot go past the time when the transaction was over.

Mr. McArthur: If they have gone into it at a subsequent time, we have a right to go into it, or the jury should be instructed——

The Court (interrupting): You better draw a request on that and I will take care of that as to the schedules.

Mr. McArthur: An exception.

Mr. Stone: We ought to ask the court at this time to determine the effect of the schedules in bankruptcy which have been introduced in here in order that we may know how to cross-examine the
158 witness upon the subject. If they are introduced for one purpose your honor is undoubtedly correct.

The Court: Mr. Lyon stated all he introduced them for was for the purpose of showing just what property there was on at that time and as a part of the evidence which it was necessary to introduce in order to recover this money in order to pay dividends to creditors. If you get that concession, do you want to get it in for some other purpose than he does? I should think that would be enough for you. I will instruct the jury that it cannot be received for any other purpose except that that Mr. Lyon just stated. That limits it; now proceed.

Q. Can you give the jury a general idea, so that they may know generally what that plant consisted of during the months of February and March, 1909?

A. I could not describe the buildings, I know there were many large buildings, and it cost a large amount of money, but it is so long ago I cannot; the sulphuric acid plant was a very large building, built on brick piers that ran up perhaps 14 or 15 feet high; and the balance was constructed of timbers; the lead chambers were above it

of sheet lead—lined with sheet lead—and the lead was expensive,—I am of the impression it sold for ten or twelve thousand dollars; and I believe it was sold for a good deal less than it was worth; there were several brick buildings, there was the boiler room of brick—25 or 30 feet square; I believe there were two boilers in it; I think there was an engine house aside from that; there was quite a large wooden building where we manufactured salt cake, I presume it was 100 feet long by 25 or 30 feet wide; there was a brick building, I presume 24 or 25 by 60 or 70 feet; I should think there was a bleach powder plant probably 75 by 100 feet; and there were one or two, and pos-
159 sibly more; there were three salt wells about 1300 feet deep; they had not been used by the company for some months; originally they were used; they cost around $5,000 apiece; there was a very large smoke stack, the base of which was around 16 by 20 feet, maybe more, and about 100 feet high, that cost around $10,000; there was some machinery in the buildings but I cannot state what; I am not familiar with it. Up to March 31st, 1909, we had expended upwards of $300,000 in the construction of the plant, I think; I know there was an acid tower on one of the buildings made of stone originally and covered with large slabs of stone; and there was a large room filled with furnaces; I am of the opinion that we closed down active operations the latter part of March.

Redirect examination.

By Mr. Lyon:

Witness: I do not know where the record of the directors of the St. Louis Chemical Co. is at the present time. I believe it was here in the court room the last I knew of it; sometimes during the foreclosure proceedings; I have not known or heard where it is since that time; I recollect that Mr. Aldrich became secretary of the company after Mr. Alger; I think Mr. Alger was acting as secretary until after the 31st of March, 1909; and he and Mr. Cocke were the executive officers of the company, while the payments in question were being made in the sense that they took the active charge and management of the company subject to reporting to, and receiving instructions from the board of directors. I have some recollection that at a meeting upon the 22nd day of March, 1909, a resolution was introduced reciting that our company was operating at a loss since the first of November, 1907—something of that kind, or that in substance; and that the loss was owing to depression in business and low prices in our
160 products; and that in the opinion of the board of directors there was no immediate prospect of an improvement in prices or conditions; I remember that too.

Q. And also that the directors were unable to secure the necessary capital to continue the business?

A. Yes, sir.

Q. And also that you were advised by the reports of the manager that the business could not be continued without additional capital?

A. Yes, sir.

Q. And that it was the opinion of the Board of Directors that the

plant be shut down until there was an improvement in business conditions?

A. Yes, sir.

Q. And that therefore it was resolved that the manager be directed to liquidate the quick assets of the company, with as little expense as possible, and apply the same in payment of the company's indebtedness?

A. Yes, sir.

Q. And pending further action of the board of directors and as soon as such assets are liquidated, and the indebtedness paid, to leave the plant under the control of a watchman?

A. Yes, sir.

Q. And if any creditor should take any action which in the opinion of the manager would jeopardize the interest of other creditors and stockholders, that a receiver be applied for?

A. I don't remember that.

Q. Will you say that was not embodied in the resolution or simply that you don't remember?

A. I don't know; I don't remember.

Q. Either that a receiver be applied for or such legal steps be taken as may be necessary to protect and insure an equal
161 distribution of the assets of the company among the creditors according to priority under the law?

A. I don't remember.

Q. And don't you remember that it was further resolved that the action of the board of directors be submitted to the stockholders with a view of securing action on their part at the then next annual meeting to be held in May?

Mr. Giddings: You left out a couple of words.

Mr. Lyon: I offer in evidence a certified copy of that resolution of this board, in view of the fact that counsel says I left out a couple of words.

Mr. Giddings: Is that part of the files.

Mr. Lyon: Part of the files in the bankruptcy proceeding, the referee's files.

Mr. Giddings: That resolution it appears by the records in that case was introduced by stipulation, which would not be binding in this case. I don't know anything about the original resolution. If I did I would be willing to make any concession within my knowledge, but I don't know anything about it. It was not there.

Q. Do you know the signature of George S. Aldrich; do you not?

A. No, sir, I don't believe I could identify it.

Mr. Lyon: Any question but what that is the signature of George S. Aldrich upon that instrument?

Mr. Stone: It looks like his signature.

Mr. Lyon: You will agree it is.

Mr. Stone: It looks like it; I could not say positively.

Q. Any question but that is the seal of the Chemical Company attached thereto?

A. No, sir, I don't think there is.

Mr. Lyon: If counsel declines to consent to that, I want to offer further proof before I offer it then. I didn't know but in
162 view of the fact that he had a copy and was correcting me in the reading I thought we might agree upon it.

Mr. Giddings: I had a copy from the files.

Q. Don't you recall that it was further resolved at that meeting that the action of the board of directors be submitted to the stockholders with a view of securing action on their part at the next annual meeting to be held in May, 1909?

A. I don't remember as to that.

Q. And that that action was to be looking to a proper provision to be made for either the continuance of the business, or a final dissolution of the company and the distribution of its remaining assets?

Mr. Stone: I object to that; I think that is all incompetent. The original record would be the best evidence. There is nothing here to show that this witness was the custodian of the record. Nothing to show that it is lost. Nothing to show but what they can produce it at any time they see fit.

Mr. Lyon: Do you know where it is?

Mr. Stone: I cannot produce it. I would like very much if I could. I don't, and if I had it, I would produce it; if I had any knowledge in relation to it I would tell you, but I don't think that it is competent here to put in a copy of the resolution of this sort in this case, oral testimony, and I object to it as being incompetent.

The Court: Does the statute require this to be recorded?

Mr. Lyon: No, sir; our Supreme Court have held that in such case until it affirmatively appears that there is a record of something required to be recorded, that you may introduce parole evidence of it.

Mr. Stone: He claims here that he has a copy certified.

163 Mr. Lyon: They don't take my claim.

The Court: I think the general rule is that you may show what action was taken at a meeting by one who was there and knows it unless it is something that the law requires to be recorded. He may answer these questions if he can remember.

Mr. Stone: An exception.

A. I don't remember. It might have been possible that there was such a resolution adopted put in writing and that I and the other directors signed it, but I cannot recall it. I do not remember it; I recollect of testifying upon that subject in the trial of the case of D. Lloyd Johnson, trustee, against Henry J. Tuger in this court.

Q. And don't you recollect that you testified upon that trial that you did remember signing such a paper, signing that paper embodying that resolution of the board of directors of this company of March 22nd, 1909?

A. Well, I might.

Q. Isn't it your recollection now upon my calling your attention

to your testimony at that time that you signed such a resolution upon that occasion?

A. Well, possibly, that is so.

Q. Isn't that your recollection, your best recollection, upon the subject?

A. I might have misconstrued the meaning of it or something; I don't know.

Q. Don't you remember that upon the trial of that case I tried my uttermost to get this resolution, this certified copy of March 22nd, 1909, in evidence and with that in view called your attention to that resolution, this certified copy of resolution of March 22nd, 1909?

Mr. Giddings: As long as he is discussing that case, we submit that resolution was not introduced in evidence.

The Court: He says it was not.

164 Q. I was trying my best to get it into the evidence and I am trying here.

A. If I admitted I signed it then, I probably did.

Q. You would say, would you not, if you testified at that time you signed it, that that was a fact?

A. Yes, sir.

Q. And isn't it also your recollection that the other eight directors of that company also signed that resolution?

A. We signed a resolution, all of us.

Q. You signed a resolution, all of you?

A. Yes, sir.

The Court: I think where you and the witness differ, when you were asking him some of the things you claim was in the resolution he said he could not remember them, he remembered some things and some he did not then; you asked him if he didn't sign such a resolution; possibly he is answering you upon the basis of what you put in last.

Q. You say you did sign a resolution, you all signed a resolution?

A. Yes, sir.

Q. And that was a resolution embodying those portions that you remember here having signed, was it not?

A. Yes, sir, I think so.

Q. Is it not also a fact that that resolution contained other things which you cannot now remember?

A. Well, I don't know; it might.

Q. Isn't it your understanding that you don't remember all the details of that resolution?

A. No, I don't.

Q. I ask you to kindly read what purports to be a certified copy of that resolution; look it over and say if that is not the resolution
165 or a copy of the resolution that you and the other directors of that company signed (counsel hands paper to witness)?

A. I presume that is correct, although I don't remember all of it.

Q. Isn't it your best recollection?

A. Part of it I know.

Q. Part of it you know, but isn't it your best recollection now that that is the resolution which was adopted at that meeting of March 22nd, 1909, which all of you directors of that corporation signed?

A. Well, I think a resolution of that kind was adopted but I cannot remember the date.

Q. You said in answer to questions by Judge Stone that you and the other directors considered the $44,000 of bonds just the same as the other $56,000 of bonds?

A. Yes, sir.

Q. You don't mean that, do you?

A. Considered them of the same value?

Q. Yes.

A. Yes, sir.

Q. And as a part of the mortgage debt of your company?

A. Yes, sir; that is, I considered them so when they were used for any purpose.

Q. Aren't you entirely wrong about that and don't you know that you are wrong because in your annual report, Exhibit 2, you put in your mortgage debt on the real estate at only $56,000?

A. I understood that.

Q. You understood then at that time that although you had a mortgage on there upon your plant, including your real estate of $100,000, yet you understood when you signed that report, Exhibit 2, did you not, that the liability upon your real estate mortgage was only $56,000?

A. Yes, sir.

166 Q. You understood then at that time, did you not, that these $44,000 of bonds were not secured by that mortgage?

A. I supposed they were a part of that mortgage but unsold.

Q. You didn't understand then, did you, that they were outstanding and secured by that mortgage and a lien upon that property?

A. Not at that time.

Q. Now don't you know that every dollar of the $44,000 of bonds were out in the hands of these banks, and yourself and Cass Wright, which have been spoken of here as security for notes held by you people for money raised to make a working capital for that corporation?

A. Yes, sir.

Q. Then didn't you understand that at that time, although they were out in the hands of these various people, that they were secured by the mortgage upon the real estate?

A. Why they were secured the same as the others.

Q. Then if you claim that to me why didn't you make your mortgage debt $100,000 instead of $56,000?

A. I didn't consider that we owed them at that time; they were simply put up as security.

All the directors considered that we owed the $56,000 but that we did not owe the $44,000 and therefore did not put them in as a part of our debt.

Q. I think you testified to Judge Stone that you thought at a certain time which was mentioned by him that it was your under-

standing that your company had assets enough to meet its liabilities?

A. Yes, sir.

Q. And that you thought at the time of signing this report, Exhibit 2, and that that was the understanding of the board of
167 directors at that time that Exhibit 2, that annual statement, fairly showed the condition of your company upon the 31st of December, 1908; is that right?

A. Yes, sir.

Q. And you also testified, did you not, that the condition of that company according to your understanding remained the same or substantially the same as it was at that time during the months of February and March when these payments were being made?

A. Yes, sir.

Q. Is it not also your understanding, to put it the other way, that if your company was insolvent upon the 26th day of February, 1909, and thereafter, that it was also insolvent upon the 31st of January, 1908?

Mr. Stone: We object to that.

A. I didn't consider them bankrupt.

Mr. Stone: It is immaterial and not proper evidence to show any intent either on the part of the bankrupt or of the defendants.

The Court: I think in view of the cross-examination he may ask that question.

Mr. Stone: An exception.

A. I didn't consider they were bankrupt.

Q. I am not talking about that; I am talking about this proposition, that if it was bankrupt after February 26th, 1909, and down to March 31st, 1909, when it was making the payments to this bank, it was, for anything you know to the contrary, bankrupt at the time that you made the statement of December 31st, 1908, was it not?

A. Sure. The conditions hadn't changed.

Q. I notice in this statement of December 31st, 1908, under subdivision H it says, "All other property; specify kinds, plant, good will, etc., $315,526.89." Now, did you know when you signed
168 that statement how much of that $315,000 was plant and how much good will and how much etc.?

A. I don't remember now; I think I knew at the time; I had to know that in order to understand what I was signing; I think that was true as to all the other directors; that is my recollection; I presume we got the information from the trial balance which was kept by our company at that time. I don't know where; by "presume" I mean that is my best recollection.

Q. Now I call your attention to the trial balance ledger or book of your company and ask you if you don't remember that upon December 31st, 1909, the good will of your company was figured at $242,511.12?

A. Yes, sir.

Q. Now you knew at that time that your Company owed over

$100,000 in money? You knew that they owed $105,705.15, as shown by your statement?

A. Yes, sir.

Q. You also knew they owed other debts at that time which were not in the report such as salaries, employees and debts of that kind?

A. I supposed everything was paid up, or included in there.

Q. Precisely, and didn't you understand from that statement made to you by the officers that this $17,974.85 of unsecured indebtedness which your statement, Exhibit 2, showed, consisted only of those debts which you owed outside of the purchase of goods used in and about your business and that it did not include debts which you owed for labor and various other things in the factory in the company?

A. Well, labor was paid weekly.

Q. Wasn't it your understanding at that time that upon the 31st of December, 1908, you owed the city of St. Louis a large
169 amount of taxes which was not included in the $17,974.85 of unsecured indebtedness?

A. Well, I knew there was some taxes we were owing.

Q. And didn't you know that they were not included in the amount I have just mentioned?

A. I don't remember of seeing them in the schedule.

Q. And wasn't your taxes at that time which you owed the city of St. Louis somewhere around $1,200?

A. Well, I think it was something over $1,000.

Q. You also knew at that time, did you not, that two payments of interest upon your $56,000 of bonds had been passed, which you owed and which were not included in that secured indebtedness?

A. Yes, I knew there was interest due on the bonds.

Q. What rate of interest did these bonds draw, five or six per cent?

A. I think they drew seven.

Q. That is right. You knew, did you not, that the interest upon those bonds amounted to substantially $1,000 at that time and that that amount hadn't yet been paid?

A. Yes, sir.

Q. So that between the taxes owing to the City of St. Louis and the interest on the bonds you knew there was over $5,000 of indebtedness of the company that this report didn't show, did you not?

A. Yes, sir.

Q. Then if you made due allowance for the $242,000 odd dollars of good will and the $5,000 which was not in your statement on account of taxes and interest on the bonds you knew, did you not, that while you owed a debt at that time of $105,705 on the statement but in reality $110,000 and nearly $111,000 that you had altogether, taking out the good will of the company, less
170 than $20,000 of property according to your estimate of the value of the property?

A. I supposed all that indebtedness was included in the one sum.

Q. Upon my calling your attention to it, you can see it was not, can you not, because there is nothing allowed there for interest?

A. There was nothing specified, no.

Q. Wasn't it understood. There is no room in there anywhere for the taxes and interest on the bonds, and talked over by your board of directors at the time that you signed this statement—Exhibit 2—that that statement lacked $5,000 of stating the indebtedness of the company?

A. No, sir.

Q. You understand that now upon my calling your attention to it?

A. I see now. I cannot see that it is in there. I knew we owed it but I supposed that everything was included in there.

Q. It appears in evidence here that the St. Louis Chemical Company in making payments to this defendant bank made two payments upon this $5,000 upon one ceratin date and two payments upon another certain date; did you ever know of the St. Louis Chemical Company doing that in the payment of any other indebtedness of that company?

A. I didn't know who they were paying.

Q. You never knew of your company making two payments to one creditor upon one day, on the same debt and doing it twice in reference to the same debt, did you?

A. I don't know anything about it.

Q. Did you know of that fact?

A. No, sir.

171 Q. Never heard of that in any other case except as it has appeared here on the trial of this case?

A. That is the only time I ever heard of it.

Q. Did you ever in your experience as a business man, holding a note against another man, have him make two payments upon one day on the same indebtedness and do it twice running?

A. I don't think anything of that kind ever came under my notice. I had been a member of the examining committee several years prior to March 31st, 1909, sometimes in checking over the paper we would have to check up the payments made and noted upon the margin of the discount register; have acted as a member of that committee two or three years probably; was never connected with any other bank.

Q. During all that time and examining that book did you ever before or since discover an instance where a debtor made two payments upon one day twice upon the same piece of paper?

A. I don't remember of anything.

Q. According to your experience as a banker and business man and according to your observation such manner of payment was entirely out of the ordinary, were they not?

A. Yes, it might have been out of the ordinary.

I have no recollection that the account of the St. Louis Chemical Company and its indebtedness to our bank came up for discussion at the bank meeting of the directors; I have no recollection either way on the subject; I am not familiar with the chemical manufacturing business; the only way we learned that our plant was not an up-to-date plant and one which could not be used to advantage in the manufacture of chemicals, was after we had operated it a while—

that it was not the latest up-to-date style; we learned that it
172 was primitive; I don't think that Mr. Alger or Mr. Cocke were experienced chemical men or familiar with that business when they came to St. Louis; in the discussion of the affairs of the company in the board of directors of the company it was also talked and discussed and agreed that on account of the peculiar location of St. Louis, being so far from the market where we obtained our products to manufacture and where we sold our products, that we had to do business at a very serious disadvantage; and that our freight rates were eating us up; and also that unless we could get a large amount of capital in there to float that business, and keep it going that we would have to close our doors and go somewhere else.

Q. And that was agreed as early as January, 1909, wasn't it?

A. I don't remember the date.

Q. Wasn't it agreed as early as the time when you commenced to make these payments upon these notes secured by the $44,000 of bonds?

A. I cannot remember.

Q. Wasn't it talked and understood by the board of directors in their meetings for months and months before the petition in this case was filed, that on account of the condition of the plant, the location at St. Louis, the freight rates and all those things, that you had either got to get a large amount of capital in or close your doors and go somewhere else?

A. It had been talked but how many months I cannot say; whether it was any great length of time or not.

Q. It was several months before the petition was filed in this case, was it not?

A. I think it was.

Q. To refresh your recollection, didn't the question of raising more money come up at that time you had the discussion in Janu-
173 ary that you testified to me about the other day?

A. I don't remember.

Q. Without undertaking to fix the time, don't you remember at the time that the proposition was submitted to pay off the debts secured by the $44,000 of bonds, that the question was discussed that you had either got to raise a large amount of capital or else go out of business?

A. I don't remember anything of that kind; I recall that after the directors had raised their respective $2,500 as working capital, and it had run along awhile, and no part of it had been paid the company was confronted with the proposition of raising more money to do business on or else go out of business; I do not recall that it was discussed among the directors as to whether or not they, the directors, would raise more money or not; I do not remember anything of the kind; I think the proposition of raising more money was discussed by the directors; I cannot remember that that discussion among the directors was prior to, or at the time that we made the annual report of December 31st, 1908. At the time we made the report I presume I and the other directors had access to

the trial balance record of the company, if we had asked for it; it must have been there in the office.

Q. I want to call your attention to this fact and ask you if I am not correct about it, that your annual report showed $105,705.65; if you would add to that the $5,000 which you owed for taxes and interest upon your bonds, it made $110,705.65 that you owed, didn't it upon January first, 1909, or upon December 31st, 1908?

A. If it was not included in that, it did. I supposed it was.

Q. You see from the report, do you not, that it was not
174 included? (Counsel shows book to witness.) Isn't that the fact?

A. Yes, sir.

Q. Now did you know when you signed that statement (annual report)—did you understand at that time that your total assets including good will were $374,719.79, as stated in your annual report, and if included in that the good will is $242,511.12, it was a mere matter of subtraction to ascertain that your total assets nominally speaking, were $132,208.65, wasn't it?

Mr. McArthur: I object to that as argumentative and computation.

The Court: It would be excepting that it is coupled with what his understanding was at that time. He may answer.

Mr. McArthur: An exception.

A. According to those figures it did.

Q. And are not those the figures that the officers of your company furnished to your board of directors at the time you made that annual report of Dec. 31st, 1908?

A. I don't know.

Q. And didn't you know at that time that if you subtracted your $110,705.65 of debts from your $132,208.65 of assets that you had at that time you made that report only $21,503 of property, upon your estimate over and above your liabilities?

A. Of course I didn't understand that report; we had more property than that; there is no question about that.

Q. Is not that just what you had, and all you had at that time?

A. I suppose it is.

Q. Didn't you understand at that time and wasn't it talked and agreed among the board of directors that your property would not begin to pay out what it was placed at in that statement of December
31st, 1908?

175 A. There was nothing said about it that I know of.

Q. For instance, you knew as a business man, did you not, that when you put a value on the credits of the corporation of $21,975.34 that they would not begin to pay out what they were put in at?

A. I don't know why they should not; I don't remember that we had any uncollectable accounts. I don't think that the board had ever been told of it if we had.

Q. I call your attention to Exhibit I-2 and ask you if you didn't know at that time that your company had met with a loss of

$868.81 with the United Box Board Paper Company of New York City which had gone into bankruptcy?

A. No, sir, I didn't know it.

Q. You recognize the signature of Frank M. Theilgar as notary public who swore Mr. Alger to that proof of claim, do you not?

A. Yes, sir.

I don't know as an ordinary business man that a large discount would necessarily have to be made upon the credits owing to the corporation on account of inability to collect.

The three salt wells had not been used for several months before the company began to make these payments that are complained of here; I don't know just how many I was informed by the people in charge of the plant it was because of the fact that the company could buy the ingredients contained in that water cheaper than we could pump it from the wells and we accordingly bought these materials, and we did not expect to use the wells any more for salt anyway, or anything else that I knew of; our company had talked that because of our unfortunate location from a business point of view we would abandon this plant at St. Louis and go to St. Louis,
176 Mo., that talk had been going on for some months before they began these payments that are complained of here; I don't remember that Mr. La Flamboy was already in St. Louis, Mo., looking after the business of our company at that point. He might have been. He had been somewhere I cannot recall whether Chicago or St. Louis. He had charge of the Chicago agency at one time.

Q. Didn't he have charge of the Chicago agency for a while and then go from there to St. Louis because your company was contemplating moving to St. Louis?

A. I have forgotten about that part of it.

Q. That was the talk among the directors, was it not, that on account of your having an old plant here, and being so far from the products which you used about your business and so far from the market where you sold your products, that it would be a good thing to move to St. Louis, Mo.?

A. I don't remember about St. Louis; we were trying to find a location though.

Q. Do you recollect whether you used sulphur in and about the business of this company?

A. Brimstone, I believe; a kind of sulphur or combination of sulphur, I guess. I don't know.

Q. In your duties as examiner of the Bank, did you learn it to be a custom of the Bank when a draft was drawn through your Bank with a Bill of Lading attached to make a memorandum of the fact upon your record?

A. I don't know.

I don't know whether or not the Company bought their brimstone with bill of lading attached with drafts drawn through the Gratiot County State Bank or where they bought it, I don't know anything about that part of it; the brimstone was used in the manu-

177 facture of something, but I cannot tell what, I couldn't tell about that.

Recross-examination.

By Mr. Stone:

Witness: In our report where we report $31,730.80 as being secured by the $44,000 of treasury bonds I understood that by the payment of that sum it would retire the $44,000 of bonds; if we had placed in our statement $100,000 of bonds instead of calling it $56,000 of bonds and then put this figure of $31,730.80 we would have put it in twice and it would not have been a true statement; that figure "liability on all other secured indebtedness" $31,730.80 must have included further sums than the notes that were in the various banks that have been spoken of here as secured by the $44,000 of bonds.

Q. Do you know how many notes or how much the indebtedness was on notes in the various banks that have been spoken of here; do you know?

A. No, I supposed it was equal to about $2,500 to each director; that would be nine times $2,500; all I know about; besides that the Wright matter made it ten. That really makes $25,000 of notes as near as I can arrive at it; it might be possible that the surplus that is in there of $5,730.80 over and above those notes might have been the interest on the bonds; I understood that that report included all of our indebtedness.

Q. Now, calling your attention to the book that Mr. Lyon has shown you where he called your attention to good will, $242,511.12, is there not various other items in that column.

A. Yes, sir; the total of the column is $519,004.01.

Mr. Lyon: I have no objection *of* both these pages being considered in evidence.

Mr. Stone: We have no objections.

178 The Court: They are considered in. The entire column with the figures opposite.

Witness: The taxes that I referred to in answering Mr. Lyon's question were the taxes of 1908.

Q. Would you regard the making of two payments in one day as unusual?

A. Why, I don't know; I suppose it would be unusual.

CHARLES W. FRENCH, a witness produced and sworn by the plaintiff, testified as follows:

Direct examination:

I live at Stanton, Mich., and I am the cashier of the State Savings Bank at Stanton, Mich., and I have occupied that position since its organization in 1901. During the years 1907, 1908 and 1909, C. H. La Flamboy was a director of our bank. I knew he was connected with the St. Louis Chemical Co., but I did not know in what

capacity. Mr. Messinger was a stockholder in both our Bank and the Chemical Co.

Sometime in the year 1907 we made a loan to the St. Louis Chemical Co.

Our bank made a loan to the St. Louis Chemical Company some time in 1907. I have here our discount register showing the commencement of that loan.

Mr. Stone: Was there more than one note?

A. Yes, sir.

Mr. Lyon: You may produce it, please.

A. (Witness producing book.) Do you want the record of the first note?

Q. Yes.

A. Yes, sir, I have the record of it.

Q. You remember, do you not, that in February and March of 1909 your bank received payments—February and March
179 and April, 1909, perhaps, upon a note which you held against the St. Louis Chemical Company?

Mr. McArthur: We object to that as immaterial.

The Court: He may answer.

Mr. McArthur: An exception.

A. Yes, sir. There were two notes. One commenced in January, 1907, I think, and that was retired before the note of 1908; long before. The date of the second note was November 12th, 1907, and was placed in our bank on the 16th; the note was for $4,500, and the maker was the St. Louis Chemical Co. W. H. Cocke, J. W. Pfeitler, H. J. Tuger and O. H. La Flamboy were endorsers or guarantors on the note; J. W. Pfeitler was not a director of our bank or connected with it in any way. C. H. La Flamboy was the one that you have spoken of as a director of the Chemical Company. I cannot tell you at whose request that note was taken into our bank.

Q. You spoke about Tuger being on that note; was that Henry J. Tuger of St. Louis?

A. That would be my understanding of it, yes, sir, I think so. It fell due March 12th, 1908, and drew seven per cent interest. Our bank held no bonds of the company as collateral security to the note, and I do not know that the endorsers held any; there were some bonds sent to our bank at one time long after that date and they came from the Old National Bank of Grand Rapids, with no explanations whatever, and I don't know what became of them; we never held any bonds of the company as collateral to its notes. I would certainly have known it if we had. We took this note as a loan and paid them $4,500 on it. There was $1,000.06 paid on this note on the 12th day of March, 1908, and a renewal made on the 19th day of March, 1908, for $3,500. This latter
note was dated March 12, 1908 payable at Stanton, and
180 The St. Louis Chemical Co. was maker and C. H. La Flamboy, W. H. Cocke and J. W. Pfeitler were endorsers. Tuger was not upon that paper. It ran four months and was renewed on the 13th day of July, 1908, for $3,500, with the same maker

and endorsers and this note was renewed on November 13th, 1908, for $3,500, with the same maker and endorsers, with interest at 7%; this note ran four months, and payments were made upon it; these payments were made at my verbal request of Mr. Pfefiler. I think they paid $81.67 interest, and $500 on the 13th day of March, 1909; and $600 on the 16th day of March, 1909, and $300 on the 22nd day of March, 1909, and $250 on the 12th day of April, 1909. I think that all these payments were made by drafts drawn by the Gratiot County Savings Bank upon either its Chicago or Detroit correspondent. The note upon which the payments were made was drawn payable to the order of our bank; the endorsers' names were on the note when we received it; none of the endorsers were relieved from liability until the note was fully paid. I had no correspondence with the Gratiot County State Bank with reference to the note or the payments that were made upon it.

(Four papers were here respectively marked Exhibits J-2, K-2, L-2 and M-2).

Witness: Those were the letters in which the payments were received.

Mr. Lyon: I offer these exhibits in evidence.

Mr. Stone: I object to them as being immaterial to any issue in this case.

Mr. Lyon: They are simply letters showing the enclosure of the drafts which made the payments.

The Court: I think they may be received.

181 Mr. Stone: An exception.

Witness: I received those letters with the drafts enclosed therein by due course of mail; and upon the dates that the payments were endorsed on the notes.

(Mr. Lyon reads Exhibit- J-2, K-2, L-2 and M-2 to the jury.)

Witness: I made a reply to the letter in which he asked for a little further time, but I am unable to find a record of the reply.

CASS T. WRIGHT, a witness produced and sworn on the part of the plaintiff, testified as follows:

Direct examination:

I live at Greenville, Mich.; I was 67 at my last birthday; I am a manufacturer of different kinds of stuff; I was a director of the St. Louis Chemical Co. during the years 1907, 1908 and 1909, and down to the time it went out of business, and the time that a petition in bankruptcy was filed against it; during this time I lived at Greenville; I attended a portion of the board meetings of the Chemical Co. but not all of them; I cannot say how frequently I attended, but several times a year; I had nothing to do with the active management of the business; I don't remember particularly about some arrangement in 1907 by the board of directors in reference to raising money as a working capital; there was some talk about their having to have some money; I don't remember

of any such arrangement that each director would either furnish or raise $2,500 to afford a working capital; it might have occurred but I don't remember any such arrangement; Martha H. Wright is an aunt of mine; she lives in Greenville; I did not loan the Chemical Co. any money; I perhaps procured a loan through my aunt, this $5,000; I don't remember the date of it; I think
182 she took a note for $5,000; I would not be sure, but I think that the note was renewed.

Q. Now, whether or not that note was obtained from your aunt under an arrangement that each of the directors was to help to raise some money as a working capital for the company?

A. Not anything of the sort that I know of; I don't remember it if it is a fact.

Witness: My aunt had a note of $5,000, I know; she looked after her business principally herself; I think that none of the directors went good for that paper; my recollection is that I arranged for the money from her in the first instance, and afterward it was concluded by the company getting it; I think she received as collateral to that note certain bonds of the company; I do not know how many; I think she held the note at the time of the foreclosure of the mortgage on the property of the company; I don't think any of the directors were guarantors or sureties on that paper; I can't say whether or not I was present at a meeting of the board of directors of the company held on March 22, 1909; that is my signature on Exhibit 2, being a report of the condition of the company on Dec. 31st, 1908; I cannot recall any of the circumstances attending the signing of it.

Q. Have you any recollection of the financial condition of the company being reported to you by the active management of the company at any time during the six months before the petition was filed in this case to have it adjudged a bankrupt?

A. I don't remember Mr. Cocke's giving a report there at one time when he thought——

Q. (Interrupting.) When was that?

A. I could not state as to that time.

Q. Could you fix the year when it was?

183 A. It is the year previous to the time of their failure there, I think.

Q. That would be in 1908 some time?

A. I think so; somewhere along there.

Q. And can you tell what time in 1908 it was?

A. No, I could not.

Q. Now, to refresh your recollection upon that subject, do you remember whether or not that meeting was held on Monday, November 30, 1908?

A. I could not say.

That was not a regular meeting of the board of directors, as I remember of, and I don't remember that all of the directors were present.

Q. Do you remember any of the facts and circumstances stated to you upon that occasion by Mr. Cocke?

A. As to the condition of the company?
Q. Any of the figures?
A. No, not particularly so.
Q. Do you remember whether or not at the time of that meeting the condition of the company was considered?
A. Yes, sir, I think he considered it difficult then to get along with it.
Q. By which you mean it was difficult to keep the company afloat?
A. Yes, sir. I don't know as it was particularly talked there but he gave that impression.
Q. That was his report?
A. It was an impression that he gave at the time.
Q. That was your understanding at the time?
A. Yes, sir.
I could not give the particulars of Mr. Cocke's report now, only merely he gave the idea that it was going to be difficult to keep the thing afloat, as I understand it; that is as I remember it now.

184 Mr. Stone: I move to strike that out. This is their witness. It is because this witness states what his idea was, and what impression he got from it, that I think it is not competent evidence in this case as to what the report was.
The Court: I think it amounts to asking what his understanding was as to what Cocke said there.
Mr. Stone: He says that he does not know what he said; he simply says that he gave that as a sort of an impression that he got. I don't think that is competent to go to the jury as to what the report was, and what Mr. Cocke said.
The Court: You may examine him further about it. I think that amounts to saying that to the best of his recollection it was the substance of it. It possibly don't quite say that. It is a matter for the jury.
Mr. Stone: An exception.

Q. Are you giving the jury your best recollection of the ideas that Mr. Cocke conveyed to you in that report?
A. I think so; yes, sir.
Q. And when you say that you have that impression or that he gave that impression whether or not by that you mean to say that it is your best recollection upon that subject?
A. That is my best recollection.
Q. And you say that that recollection is that he said to you in substance that it would be difficult to keep the company afloat?
A. That is as I remember it now. That is my best recollection; I cannot say as to the date when Cocke was telling that, but I think it was during the year 1908 some time. That is my recollection; I don't remember as Cocke at that time stated any reasons why it would be difficult to keep the company afloat. I don't think
185 he said anything at that time about the unfortunate location of the company from a business standpoint.
Q. To refresh your recollection whether or not he said anything

at that time in reference to the fact that your plant was old and antiquated?

Mr. McArthur: I object to that as leading.
Mr. Lyon: I have exhausted his recollection.
The Court: He may answer that.
Mr. McArthur: An exception.

A. I don't remember of his saying anything of that sort.

Cross-examination.

By Mr. McArthur:

(Witness shown a note given by the St. Louis Chemical Co. to Mrs. Wright, on April 18th, 1908, due one year after date, for $5,000.)

Q. Did you ever see that note before?

A. No; I don't think I did. They were wanting the money, and she had the money that she could spare, and I said to her that I thought it would be all right to make the loan if she saw fit. I presume she made it partly on my advice. I think I was a director of the company at the date of that note. I thought it was all right at that time; during the year after this note was given I did not have any further talk with her about the obligation. I did not suggest to her that there was any question as to the solvency of the company during that time; and during that time I did not suggest to Mrs. Wright that there was any question about that note being paid; and up to the time that the note became due, I had no knowledge, and had not learned from any source that there was any question as to the solvency of the Company.

Q. I think you said yesterday that you at one time had a
186 talk with Mr. Cocke, the president of the company, in which he stated that it might be hard sledding or something of that kind.

Mr. Lyon: That statement is not a fair statement. He testified it was at a director's meeting and Mr. Cocke made that statement.

Q. I don't care where it was; I want to ask you if it is not true that that statement of Mr. Cocke was made some time after this note became due?

A. It probably was.

Q. I think you said yesterday that you could not be certain as to when Mr. Cocke made that statement?

A. No, sir.

Mr. Lyon: I object to the misstatement of the testimony. He several times yesterday stated that statement was made by Mr. Cocke in the year 1908.

Mr. McArthur: He testified he could not be certain.

The Court: You are probably both right if you mean certain as to the month, he did say that.

If I had had any suspicions as to the solvency of the company, or whether that note was to be paid I would have talked with my

aunt about it; and I never did talk with her about it; I could not say now that I am certain that the talk or conversation with Mr. Cocke took place after that note became due. If at any time anything had come to my attention affecting the solvency of the company I think I would have talked with my aunt; I do not remember any conversation with her about the note after the loan was made.

Q. Do you have any recollection of being present at a directors' meeting on March 22nd, 1909?

A. I am not able to state the date now.

I did not participate in the meetings very often, and I cannot tell the dates of any meetings in 1909 that I attended; I might
187 have been present but I cannot recall any dates now. This note of Mrs. Wright was secured by bonds as collateral. I understood that the bonds that were given as collateral security to the note of Mrs. Wright were a portion of the $44,000 of bonds, that have been referred to here as treasury bonds. At the time of the giving of this note I believed that those bonds (following statement offered as bearing on intent of company) were valid and legal and were secured as the other bonds of the company were secured; and nothing came to my attention to change my mind upon that question until after the first day of April, 1909.

I do not remember of any particular month of the year 1908 that I was present at a director's meeting of the Chemical Company. There were times when I was present at those meetings, although I cannot give the date.

Q. Do you remember of hearing of the fact of the petition in bankruptcy being filed against the company?

A. No, sir.

Q. Do you mean that; don't you remember of hearing of the fact, of hearing that an attempt was being made to put the company into bankruptcy.

A. No, I don't remember of hearing anything about it; that is, officially, anything of that sort.

Q. I mean do you remember of its coming to your attention?

A. Outside, I perhaps heard of it; yes, sir.

Q. With reference to the time you heard of that, I want to ask you whether up to that time you had any information or any cause to believe that the assets of that company were not sufficient to pay its debts?

A. No, sir.

What Mr. Cocke said to me about the company was only this: That it was hard sledding; that they hadn't money enough to carry
188 on the business, or something of that sort. Mr. Cocke did not in that conversation, or in any other conversation ever intimate to me that there was not property sufficient to pay the debts. And no officer or director of the company ever intimated such a thing to me. I cannot call to mind now any fact or circumstance that indicated to me that officers of the company believed that its assets were not sufficient to pay the debts.

Redirect examination.

By Mr. Lyon:

I don't think that my recollection of when that talk was of Mr. Cocke, is any keener this morning than it was yesterday; I thought yesterday that it was in 1908 but I was not sure of it; that was my best recollection yesterday and that is my best recollection now; I do not remember of receiving a letter from the company shortly after the 26th of November, 1908, to come over and attend a meeting of the directors at which Mr. Cocke would be present.

Q. Whether or not it is your best recollection that the time that Mr. Cocke made that statement that it was difficult, or hard work to keep the company afloat was made in 1908?

A. I think it was, though I could not say for certain.

(A letter was here marked Exhibit O-2.)

Witness: It would be my recollection or best impression that I received a letter of which Exhibit O-2 is a copy.

Mr. Lyon: I offer in evidence Exhibit O-2.

(Mr. Lyon reads Exhibit O-2 to the jury.)

Witness: I presume that the original letter was signed by L. B. Alger, Secretary.

189 Q. Did you know that at the very time of writing that letter, this company was engaged in paying off the notes upon which the directors of that company were endorsers or back of the paper?

A. No, sir, I could not say as to the time.

Mr. Lyon: In connection with the examination of the witness I offer in evidence the $5,000 note of Mrs. Wright.

Mr. McArthur: That is objected to as incompetent and immaterial. I raise no objection about that being the note.

Mr. Stone: For what purpose is the note offered?

Mr. Lyon: For the purpose of showing that instead of this company, in February and March, 1909, intending to retire notes secured by the bonds, that they were intending to retire only papers upon which the directors were personally responsible, as showing an actual intentional fraud on the part of the directors of this company and bringing this defendant under the provisions of 67-E of the Bankruptcy Act.

Mr. McArthur: And for the further reason that the 67-E of the Bankruptcy Act cannot have any application to this case.

The Court: Without deciding which ground it may be received under, I think it is competent to offer the note after an examination has been pursued upon it, and as a part of the cross-examination.

(Mr. Lyon reads the note to the jury.)

Mr. Lyon: No payments endorsed anywhere on the note.

Mr. Stone: An exception.

Witness: I do not remember of being there at a meeting of the board of directors on March 22nd, 1909; I do not recall being at a meeting where a resolution was passed, put into writing and signed

by all of the directors in reference to the financial condition
190 of the company; I do not remember speaking to either Mr. Alger or Mr. Cocke in reference to their proposal to make the bonds collateral to my aunt's note, $9,000, in this letter of March 12th. I do not remember speaking to them about that; I do not remember anything about that; my recollection of the details of the affairs of the company are very meager, not having much to do with it.

Q. Whether or not it is your recollection that the only discussion you remember in reference to the financial condition of the company was when Mr. Cocke made that statement some time in 1908 that it was going to be hard work to keep her afloat?

A. That is about the only thing, and that made an impression on me. That did not convey to me the idea that there was danger of its sinking, but it was going to take hard work to keep it afloat.

By Mr. McArthur:

At the time that I received this letter on March 12th, 1909, asking me to bring over Mrs. Wright's note, and that they were going to put up additional collateral, I did not have the slightest suspicion that the note was not perfectly good; I believed at that time it was good and that the company was solvent; and I believed it for a long time after that. I don't think that there was any payments made upon this note; I have no knowledge about it.

CHARLES W. FRENCH, recalled for further examination.

Direct examination.

By Mr. Lyon:

Q. Turn to your discount register and tell the jury the dates and amounts of the payments upon the last $3,500 note, made after March 31st, 1909.

191 Mr. McArthur: We renew our objection made to that, and understood that the court ruled upon that once.

Mr. Lyon: I make the offer for the purpose of bringing up this proposition; it is the claim of this company through Mr. Tuger, one of its directors who claims to have been present and had personal knowledge as to an arrangement, that the company arranged some time in January of 1909 to pay off and retire the papers secured by the bonds, and the answer in the bankruptcy proceedings indicates that was their purpose, and they claimed the right to do that because it was a class by itself. I have shown that Mrs. Wright, who had $15,000 of bonds, didn't get a penny upon her note, and I propose to show that this bank, who didn't have a penny's worth of bonds but had directors back of the paper, got their pay in full, and I offer it for the purpose of showing the fraudulent intent on the part of this company to prefer those creditors upon whose paper the directors were liable.

The Court: I think the testimony is competent. The question is this, if they plant their case upon the theory that the Chemical Com-

pany entered upon a system of paying off certain debts, preferring them, should I limit them to just showing what was done up to the time that they paid the last payment to the bank here or are they not entitled to show all that they did in pursuance of the original intention? Isn't it a principle all through law that you may show what a party does afterwards as bearing upon what his intention was before.

Mr. Stone: An exception.

Witness: A. April 12th, 1909, $250; April 27th, 1909, $300; May 3rd, 1909, $305.12; June 25th, 1909, $1,244.88. That paid the balance of the note. We received the last payment of June 25th, 1909; I think that all the payments were made by draft; the
192 first three payments were made by drafts drawn by the Gratiot County State Bank upon its correspondents.

WILLIAM R. SEATON, a witness produced and sworn on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. Lyon:

I live in Detroit, and I am Chief Clerk Legal Department Pere Marquette Railroad Co.

These exhibits marked R-2, S-2, T-2, U-2, V-2, W-2, X-2 Y-2, Z-2 and A-3, B-3, C-3 and D-3 are bills of lading from the Auditors' Department of the P. M. R. R. Co. It was conceded by counsel for the defendant that these bills of lading were attached to drafts drawn by the Union Sulphur Company on the St. Louis Chemical Co. through the Cleveland National Bank and paid through the defendant bank, and which are in evidence.

Cross-examination.

By Mr. Stone:

(Witness shown a signature on the back of a check dated February 25, 1909, and marked Exhibit 3.)

Witness: I have never seen that signature to my knowledge.

(Witness here shown a signature on the back of a check dated May 20, 1909, and marked Exhibit 4.)

Witness: The name is familiar, but the signature I cannot say whose it is; it looks like the signature of our agent at St. Louis or Alma; it is one of those stations over there. On that date I know that William Durkee was agent for the company.

I do not know what payments our company received from the St Louis Chemical Co. during the months of January, February, March and April, 1909.

193 Redirect examination.

By Mr. Lyon:

It was the prevailing rule of our company from the 1st day of July,

1908, to the 10th day of January, 1909, that bills of lading with drafts attached, received by our agents were returned to the auditor.

Mr. Lyon: I offer in evidence from the records of articles of association kept in the clerk's office in this county, the entry of a copy of the articles of association of the St. Louis Chemical Company for the purpose of showing that it was organized under Act 232 of the Public Acts of 1903, simply to fix the statutory status of the directors.

Mr. McArthur: We have no objections, but we would like to have Article 7 read to the jury.

(Mr. Lyon reads Article 7 to the jury.)

D. LLOYD JOHNSON, a witness produced and sworn in his own behalf, testified as follows:

Direct examination.

By Mr. Lyon:

I live at Alma, and my business is attorney. I am trustee of the St. Louis Chemical Company. I have on hand with which to pay the debts that have been proven against the estate the sum of between fifteen and sixteen hundred dollars; none of the debts that have been proven have been paid to my knowledge.

Cross-examination.

By Mr. Stone:

I do not know what debts have been proved against the estate; I am fairly familiar with the petition that was presented in the case; I know that the Pere Marquette Railroad presented a claim,
194 and I understand that it was one of the petitioning creditors. I did not know that at the time that the Pere Marquette presented their claim that they had received payments on their claim during the months of February, March and April, 1909; I don't know it now. I have not made any investigation to ascertain whether they did or not.

WILLIAM A. BAHLKE, a witness produced and sworn, was called for further examination.

Redirect examination.

By Mr. Lyon:

Prior to the filing of the petition in the Bankruptcy Court, on June 25, 1909, I went to the office of the St. Louis Chemical Company, in connection with the creditors whom I represented.

Q. When there did you have any conversation with Mr. Alger, the secretary of the company, in reference to the plan and purpose of the St. Louis Chemical Company in the treatment of its creditors?

Mr. McArthur: That is objected to as immaterial, irrelevant and hearsay.

The Court: He may answer yes or no.

A. I did. It was not far from but after the 1st of March, 1909.
Q. You may state to the jury what that conversation was?

Mr. McArthur: We object to it as being purely hearsay, irrelevant and immaterial.

The Court: If he was such an officer as his statements showed what the company was doing would it not go to bear upon the intent of the company at that time?

Mr. Lyon: I waive the question.

195 Witness: I knew Mr. Alger, and had been acquainted with him previous to that time about two years, and during that time he was secretary of the company; he was still secretary at the time I talked with him. I knew W. H. Cocke, and had known him a year or two; I have seen the signature of W. H. Cocke a number of times; I acted as its attorney and I think I am able to identify it.

(Witness' attention called to Exhibit Z-1.)

In my judgment that is the signature of Mr. Cocke to that exhibit. I produced this letter in Court; I received it from one of the creditors of the St. Louis Chemical Co.

(Witness' attention directed to Exhibit A-2.)

Witness: I received that letter from Handy Bros.' Mining Co. Their office is in Bay City, Mich. I received Z-1 from Bay City, Mich. I received Exhibit B-2 and brought it into Court; I received that from the Michigan Salt Co., Saginaw, Mich. I received Exhibit Y-1 from the United States Coal Co., Cleveland, Ohio.

Mr. Lyon: We offer in evidence Exhibit Z-1, the others having been read.

(Three papers were here marked respectively Exhibits E-3, F-3, G-3.)

Witness: I received Exhibit Z-1 from Handy Bros. Mining Co., with the other papers in the case, with reference to their claim.

Mr. McArthur: We object to introducing in evidence a letter without any proof that it ever became the act of the person who purported to write it. I never supposed that you could introduce
196 a letter in evidence by showing by someone, that he got it from someone else and possibly they got it from someone.

The Court: Is it written upon any letterhead?

Mr. Lyon: Yes.

Witness: It is written upon the ordinary letterhead of the St. Louis Chemical Company.

The Court: I think that a letter coming as the evidence shows this one did, into the hands of the witness upon the letterhead of the Chemical Company, if signed by the company or some official, I think that is prima facie evidence sufficient to receive it.

Mr. McArthur: An exception.

(Mr. Lyon reads Exhibit Z-1 to the jury.)

F. W. LIVINGSTONE, a witness produced and sworn by and on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. Lyon:

I live at St. Louis, Mich., where I have lived during the last two years and five months. I am local agent for the Pere Marquette Railroad Company. Before I came to St. Louis I was in the employ of the railroad in different capacities, and had been station agent at different places. During the years 1908 and 1909 a record was kept in the local offices of the Pere Marquette Company of bills of lading, with drafts attached, covering shipments of goods. I have with me such records from September 1st, 1908, to February 1st, 1909.

(Plaintiff offered in evidence Exhibits U-2, V-2, W-2, R-2, S-2, T-2, X-2, Y-2, Z-2; A-3, B-3, C-3 and D-3, the same being bills of lading with drafts attached and each reading received from Union Sulphur Company, Baltimore, Md., St. Louis, Mich., description of the
197 articles being crude brimstone or sulphur, being bills of lading with drafts attached Consignee Union Sulphur Company, notify St. Louis Chemical Company, and drafts drawn through the Cleveland National Bank, Cleveland, Ohio.

Mr. McArthur: May our objection cover all this line of proof, and exception follow.

The Court: Yes. What is the particular ground of the objection?

Mr. Stone: That it is immaterial. It cannot make any difference with the case whether the drafts that were paid were paid by draft attached to a bill of lading or whether it was paid subsequently. It is no indication of insolvency, or a failing condition or a mark against the credit of anybody that he has goods shipped to him with draft attached to the bill of lading.

The Court: Mr. Lyon offers this upon the proposition to show that the drafts that you claimed were paid during the time that the others were being turned down, that he put in were of this kind; his proposition is simply to show what kind of drafts were being paid. Wouldn't it be competent to do that?

Mr. Stone: Not unless the Court can say to the jury that they should be regarded differently than other debts.

The Court: I should think this would be competent in view of the testimony that you drew out.

Mr. Stone: An exception.

Witness: All these drafts bear the stamp of the Gratiot County State Bank.

The plaintiff also offered and the Court received evidence showing the numbers of the various cars, bills of lading to correspond, drafts attached thereto, payment through the Gratiot County State Bank and delivery of the drafts and bills of lading to the St. Louis
198 Chemical Company, together with checks drawn by the St. Louis Chemical Co. on the Gratiot County State Bank for each one of said drafts, and which bills of lading, drafts and checks

cover twenty, all of the Cleveland National Bank drafts. It was necessary to pay the drafts to get the goods.

Cross-examination.

By Mr. Stone:

Q. Is it not a matter of frequent occurrence to have the business men in St. Louis receive goods by bill of lading with draft attached?

Mr. Lyon: I object to that as immaterial.

The Court: How would that be material so far as he is concerned? I allowed that class of testimony as to the bank officials on the ground that it might have something to do with the reasonable cause to believe, but how is it important as to what he knows about it?

Mr. Stone: I want to know what he knows about the fact as to the practice; that would bear directly on the question of notice.

The Court: Unless it came within the knowledge of the bank officials it would be of no importance, would it?

Mr. Stone: I apprehend that counsel for plaintiff may claim that the fact that they were receiving goods in this manner and by draft going through the bank might operate as notice to them of some financial weakness or something of that sort.

Mr. Lyon: We are offering this testimony in rebuttal of the effect of the evidence which they drew out from Mr. Thedgar on cross-examination.

Mr. Stone: If they will say that they don't claim anything of that kind for it, and won't claim anything for it in this case, I don't care to take this question.

199 Mr. Lyon: As to this question, it is utterly immaterial what the habit is. That is a matter that must be confined to the knowledge and attention of the bank.

The Court: I think so. Objection sustained.

Mr. Stone: An exception. I propose to show by this man who is the agent of the railroad company there, that people who were in very excellent standing, and now doing business there in St. Louis, and who are regarded as perfectly sound financially are receiving goods very frequently in this manner by bills of lading and draft attached.

Mr. Lyon: An exception to counsel's statement. I don't believe there is any such state of affairs, and it is utterly immaterial if there is.

Mr. Stone: I withdraw the question.

Q. Do you know Felix O'Melia of St. Louis?

A. Yes, sir.

Q. What is the fact that he is a prominent business man of the city?

A. Yes, sir.

Q. What is the fact, so far as you know, his financial integrity is undoubted there?

A. Yes, sir.

Q. What is the fact as to whether Felix O'Melia frequently has shipments made to him of goods by order bill of lading with draft attached?

Lyon: I object to that as immaterial.
The Court: Sustained.
Mr. Stone: An exception.

200 WILLIAM A. BAHLKE resumed the stand for further examination.

Redirect examination.

By Mr. Lyon:

Witness: This Exhibit M-3 is the loose-leaf ledger of the St. Louis Chemical Company in its office in June, 1909, to my personal knowledge. It was used there by it in the course of its bookkeeping and business; I cannot tell that the same leaves are in it now as were then; that is all.

Q. Look it over carefully and tell the jury your best knowledge on the subject. Any question about that being the ledger of the Chemical Company?

A. I will say that I had had this book in my possession for upwards of a year, about a year and a half, and had a number of occasions to go over the entire book, and in my judgment this book is now in exactly the same shape it was when it was received from the St. Louis Chemical Company.

Mr. Lyon: I offer in evidence a certain page of this book marked Exhibit N-3 and the entries in reference to the good will of that company.

Mr. McArthur: We object to it as incompetent and not being properly proved, and that the page there purports to be taken from some other book.

Mr. Lyon: We offer it to corroborate my claim, that the amount stated in the trial balance, that the good will of the company was $242,511.50 is correct as shown by the ledger.

Mr. Stone: We make the additional objection that a loose-leaf ledger, any page may be removed and substituted at any time, and there is no evidence here that that book had that leaf in it
201 in January, February or March, 1909. I think we should be just a little bit careful about that.

The Court: I think it is prima facie evidence, unless there is some evidence to show that it has been tampered with in some way.

Mr Stone: An exception.

Mr. Lyon (Reading from Exhibit N-3): St. Louis Chemical Company. Account number, blank. Name, good will, 1907. May 15th, J. Folio 3/. In the column headed debits $181,342.10. May 15th, J. Checked down Folio 13, $56,000. Then those footed——

Mr. Stone (interrupting): Do you propose to read those lead pencil figures in there?

Mr. Lyon: I don't care anything about it. Yes, I propose to read them. I have a right to read them.

Mr. Stone: Somebody has interpolated between the figures made with ink, in a fine pointed lead pencil certain figures. We insist that that is not evidence to be read. The book is not kept and figured upon in that way, and those figures do not appear to be in the regular course of business.

Mr. Lyon: I call attention of counsel that all the figures are totalled with lead pencil.

The Court: Where is there any rule that a book kept in pencil is not in the regular course of business, any more than one that is kept in ink?

Mr. Stone: If it was all kept in pencil, yes; but if it was kept in ink and figures interpolated with pencil, it seems to me it should not be regarded as having the authenticity of a regular book account.

Mr. Lyon: They are simply the totalling in pencil.

The Court: You may read them.

Mr. Stone: An exception.

Mr. Lyon (continuing reading): $237,342.10. September 1st, I checked down Folio 79, $5,169.02; total in figures $242,511.12. Total in lead pencil $242,511.12, the same as on the trial balance.

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Mr. McArthur: We ask that that be stricken out because there is no proof, and they don't propose to offer any; that that was taken into consideration or became a part of the report made to the Secretary of State.

The Court: Motion denied.

Mr. McArthur: An exception.

Witness: I should say to the best of my knowledge that Cocke had been president of the company two years before the petition in bankruptcy was filed. Mr. Alger was secretary of the company during that time. Upon this occasion, when I went there soon after the 1st day of March, 1909, Mr. Alger was in the office; I didn't see Mr. Cocke that day to my recollection. The occasion of my going there was that as an attorney I represented the claims of the United States Coal Company, and the Pere Marquette Railroad Company, and I also had the claim of W. R. Grace & Co. of New York City. I had a conversation with Mr. Alger, as I have before testified.

Q. What was that conversation?

Mr. McArthur: I think our objection was pretty fully stated before. We renew it now.

The Court: He may answer.

Mr. McArthur: An exception.

Witness: I stated to him that I was there to see the St. Louis Chemical Company with reference to two claims that I had against the company for collection; stating that they were the Pere Marquette Railroad Company, about $2,300, and the United States Coal Company, of something of upwards of $800; and I was also re-

quested to inquire for the W. R. Grace Company of New York City, who held a claim of $2,700, as I was advised, and asked him
203 what I might expect from the St. Louis Chemical Company with reference to their payment. I think as I now remember it, that I also asked him at the beginning of the conversation as to whether the amounts of the claims were correct, that I stated the amounts were. This was done to verify the accounts from the records of the company. He told me what the amounts of the claims were as represented here—as shown by their books. This is a memorandum made at that time of these claims.

(Witness produces paper.)
(Paper marked Exhibit O-3.)

He requested Miss Noyes to state to me what the amount of the claims were as then showed by their books, and I took them down on this memorandum in his presence.

Mr. Stone: This is all objected to as immaterial.

The Court: I don't see how it is very material, the amount of the claims.

Mr. Lyon: I am showing that they were denying claims that there is no dispute about, and I will cover the other subject before I get through.

The Court: All right, with that claim made by Mr. Lyon I will permit him to show it.

Mr. Stone: An exception.

Witness: I took it in round numbers, as appears from this memorandum. W. R. Grace & Co., $2,700; Pere Marquette Railroad, $2,300; United States Coal Co., $816.

I told him that I understood that the affairs of the Chemical Company were in a critical condition financially, and that I was over there for the purpose of seeing what arrangements I could
204 make with reference to the claims of my clients; and Mr. Alger then said that the company had agreed upon a plan of liquidation of its debts; that it had been agreed to by the directors, and that they were attempting to carry it out. He said that within a day or two he was expecting to see the officers of the Pere Marquette Railroad Company in Detroit in regard to the plan, and that he had already seen a representative of my client, the United States Coal Company; and that he had written to W. R. Grace & Co. with reference to the plan that they proposed to carry out, and he said that he would take it up with my clients, and he preferred not to do it through me. I told him I was there to represent my clients, and that if there was anything done with these claims he would do it through me. I was there to represent them and to talk for them, and to act for them, and that I proposed to do it. I told him I should be glad to have him tell me what the plan was, and he said he would be glad to do so. He proceeded to tell me what the plan was; he said that the directors had agreed——

Mr. Giddings (interrupting): This is under our objection in regard to this line of testimony.

The Court: It certainly is. There is no difference in the line of testimony. I have ruled upon it and you have an exception. Proceed.

Mr. Stone: I object to what the secretary said as to what the Board of Directors had agreed to, and I move to strike out what the witness said before as to what the secretary said the Board of directors had agreed to, as being hearsay and incompetent, as to what the Board of Directors had done.

The Court: If any of the talk is competent, it is all competent. If it is not competent at all then none of it is competent. It may stand.

205 Mr. Stone: An exception.

Witness: He said that the directors had agreed that the St. Louis Chemical Company would sell the quick assets of the company, collect in its accounts and bills receivable and from the proceeds of these collections they would pay, and retire an indebtedness that was owing by the company to various banks and directors, who had advanced money at the time of their reorganization, to keep the company going, and I think he told me the amount of those notes; I cannot remember it in exact figures, but somewhere over $20,000. He said that these notes were held by various banks, mentioning some of them, not all of them. He mentioned the Gratiot County State Bank, the Commercial Savings Bank of St. Louis, the Stanton Savings Bank. I remember of no others. He said that these notes had deposited as collateral to them $44,000 of the bonded indebtedness of the company and that the plan was to pay and retire those notes and turn back into the treasury of the company the $44,000 of bonds held as collateral to them, and after those notes were paid, that the general creditors, including my clients, would be paid if there was anything—I cannot say that he put it just that way—that my clients would then be taken care of or paid, and that until then he could not do anything about it, and would not do anything about it until the notes held by those banks, which he said were endorsed by the directors, were paid in full.

I told him that in my judgment that that plan was an unlawful one.

Mr. Stone: We object to that.

Mr. Lyon: It is merely preliminary to his reply.

The Court: If the testimony is competent at all it is all competent, so that——

Mr. Stone (interrupting): An exception.

206 The Court: The jury will understand what meaning Mr. Alger's answer had to it.

Witness: This part of the conversation didn't occur just at this point. We went into the assets of the company before this feature of the conversation was taken up. Before the ultimatum was given by myself as to what I would do about these claims; I inquired into

the assets of the company and asked him if he had any objections to telling me fully in regard to it. He said he didn't, and I then inquired what the accounts and bills receivable of the company were. He told me on that date that the March 3rd, 1908—that the balance was February 28th, dated March 1st here—of accounts and bills receivable was $19,473.68. I then inquired about the real estate investments of the company. I don't remember that he told me what they were carried at, but I asked him about the value of the plant for the purpose of their business. Mr. Alger talked freely in regard to the plant. He said that the plant of the company was one that it was impossible to make money with.

Mr. Stone: We object to this as not being binding on the company, and being immaterial evidence, and not the best evidence as to what the property of the company was at that time.

The Court: I don't understand that it is offered to show what the property was. I understand it is offered to show—to characterize the intent of the company in making these payments. Isn't that the reason of it?

Mr. Lyon: Certainly.

The Court: It may be received for that purpose.

Mr. Stone: An exception. Do I understand the Court holds that the statements of Alger as to what the company possessed at
207 that time would characterize that intent without regard to the fact as to whether he was stating it right or not?

The Court: I have not so held. That evidence of the man in charge, as the secretary was there, his talk with Mr. Bahlke as to what they proposed to do at that time, was competent testimony as bearing upon their intent.

Mr. Stone: An exception.

Witness: He said that the plant was built by a person who did not know anything about the modern methods of manufacturing chemicals, and that part of it was abandoned, and could not be used then, and had been for some time.

Mr. Stone: I object to that as it appears that this was nothing but the opinion of Mr. Alger that he was giving to the witness.

The Court: The same ruling as before.

Mr. Stone: An exception.

Witness: I was trying to think if I could remember clearly anything further that he said about it; he said that the operations of the company for some time past had demonstrated that it could not succeed in the City of St. Louis; he said that one reason was that the freight rates in and out of St. Louis and the methods that they were compelled to ship it; that is, in carboys, made it impossible to manufacture with any profit, and that it was all nonsense to try and succeed with it there and that they were going to quit it just as quick as they could, and that they had already made arrangements to go to St. Louis, Missouri, with the plant, or East St. Louis, Missouri, or move there themselves, if the plant was not available for that purpose; those were the two principal reasons why, he told me, that they

could not succeed there. There were others, but I don't remember what they were.

208 The conversation then turned upon the ability of my clients to collect anything against the company, and he said that the entire assets of the corporation were covered by a trust mortgage for $100,000 and that the general creditors would not be able to force any collections, as against that condition; and I asked him then if he regarded the trust mortgage as covering the accounts, bills receivable and cash, of the corporation, and he said that he thought it did. I said in my judgment it don't. Now I said how much do you regard the accounts and bills receivable of the company as worth. He said that the accounts would not collect—no, I withdraw that—he said that there would be a big shrinkage of the accounts and bills receivable if forced to collection.

Mr. Stone: We object to it as being an opinion, and ask that it be stricken out.

The Court: The same ruling as before.

Mr. Stone: An exception.

Witness: That there were a certain amount of credits to be given two or three debtors on their accounts for carboys, I think he mentioned, and that there would be a big shrinkage in the amount that could be collected from them, but he did not give me an answer as to what he thought could be collected. After we had discussed the trust mortgage and its terms, I asked him what I could understand would be the attitude of their company towards my clients, and he said our management propose to carry out exactly the plan that is agreed upon by our directors, and that he thought that the plan was a good one, and he said, if you don't acquiesce in it, you will have to take such course as seems best to you. I then told him that his plan of liquidating the indebtedness at the banks upon which his directors were liable, as against my clients, was clearly a preferential payment under the general bankruptcy statute, that if he

209 was to tell me that afternoon as an official answer that they would not change their plan as he had outlined it to me, that it would undoubtedly lead to bankruptcy proceedings, if not their liquidation; that I should not sit down and consent that my clients receive nothing while other creditors were receiving more, and that he could take his option of agreeing to my position rather than my agreeing to his position. He said that is our plan, you will have to do as you see fit about it. That practically concluded the conversation.

Miss Noyes was employed in the office of the Chemical Company at that time, apparently bookkeeping, working on the books. I cannot state the details of her work in the office at that time.

Q. State whether or not you know of letters being sent out by the Chemical Company by Mr. Alger as secretary of the company initialed "N" for Miss Noyes?

A. I don't know whether they are initialed "N" by Miss Noyes; I know there was lots of letters sent out from the office of the Chemical Company signed by Mr. Alger and under it noted "N."

I got no money on any of my claims. I brought this letter—Exhibit E-3 into Court; I received it from the law firm of Loesch, Schofield & Loesch, Chicago, Ill., and it is pertaining to the claim of Lucy Slade against the Chemical Co. and I did and do represent her as her Attorney; and it is one of the claims allowed by the Bankruptcy Court; I also received Exhibit F-3 from the same source, which is in respects to the same claim; they are written upon the letter heads of the St. Louis Chemical Co. I also received Exhibit G-3—which I have brought into Court; I received it from the David Cole Creamery Co., Omaha, Neb., and it is in reference to a claim that I represent as its attorney. From my course of dealing
210 with the Chemical Co. I know that it was accustomed to sign its letters "St. Louis Chemical Company" with a rubber stamp.

Mr. Lyon: I offer in evidence Exhibit E-3 and Exhibit F-3.

Mr. McArthur: We object to both of these exhibits for the reason that there is no proof that they were ever written by the St. Louis Chemical Co. or any of its officers or agents or that if they ever were written, they were ever delivered and sent to any one, and the contents of them are no evidence of the facts therein stated as against this defendant.

Mr. Lyon: I show their delivery, by showing that they came from this firm of attorneys to Mr. Bahlke in connection with this claim of Mrs. Slade, and I have shown that the company was accustomed to send out letters signed with the St. Louis Chemical Co. stamp in that manner and that they are written on the letter heads of the company.

The Court: The same ruling as before. He may answer.

Mr. McArthur: An exception.

(Mr. Lyon reads Exhibit- E-3 and F-3 to the jury.)

Witness: Neither Mrs. Slade or myself received anything on that claim.

Q. I hand you the collection register of the Gratiot County State Bank, and ask you to run through from the 1st day of July, 1908, down to the 1st day of December, 1908, and tell the jury the memorandum therein contained of any drafts or notes of the St. Louis Chemical Company which went to protest, or were returned between those dates.

211 A. Date Aug. 4th, 1908; owner, Corn Exchange National Bank, Chicago, Ill.; amount, $22.45; payable on demand; returned Aug. 13th, 1908.

Date 8-4-1908; owner, Bankers' National Bank, Chicago, Ill.; amount, $86.19; payable, sight; returned Aug. 22d, 1908. Date, 8-27-1908; owner, Mich. Carbon Works, Detroit, Mich.; amount, $19.50; due, sight; returned, Aug. 31st, 1908.

Date, Sept. 19th, 1908; owner, Peoples' Savings Bank, Saginaw, Mich.; amount, $120.43; due, sight; returned, Sept. 21st, 1908. Date, Sept. 21st, 1908; owner, Peoples Savings Bank, Saginaw, Mich.; amount, $120.43; due, sight; returned, Sept. 26th, 1908. Date, Oct.

2d, 1908; owner, Morrison & Co., Chicago, Ill.; amount, $92.16; due, sight; returned, Oct. 9th, 1908.

Date, Oct. 6th, 1908; owner, Peoples' Savings Bank, Saginaw, Mich.; amount, $112; returned, Oct. 12th, 1908.

Date, Oct. 20th, 1908; owner, Armour Curled Hair Works, Chicago, Ill.; amount, $19.89; due, sight; returned, Oct. 24th, 1908.

Date, Nov. 11th, 1908; owner, Mich. Carbon Works; amount, $39; returned, Nov. 17th, 1908.

Date, Nov. 10th, 1908; owner, First National Bank Chicago; amount, $46.60; due, sight; returned, Nov. 17th, 1908.

Date, Nov. 10th, 1908; owner, National Bankers' Bank; amount, $134.64 due, sight; returned Nov. 23rd, 1908.

Date, Dec. 1908; owner, Fred Biddlecomb, St. Louis, Mich.; amount, $15.00; returned, July 28th, 1909.

Date, June 1st, 1908; owner, F. Biddlecomb, St. Louis, Mich.; amount, $15.00; due, sight; returned, July 28th, 1909. That is all.

I was there at the St. Louis Chemical office after that between the 15th of June and 23d of June I had no conversation with
212 either Mr. Alger or Mr. Cocke; Miss Noyes was there and I looked over the books, records and checks of the company I cannot identify the checks I saw either in number or amount other than to tell generally what I did with them; Miss Noyes made on that date, in my presence, the paper consisting of four sheets known as Exhibit 3, introduced before Lee E. Joslyn, Referee in Bankruptcy at Bay City, Mich., upon the trial of this issue and which exhibit is contained in Exhibit "C" in this suit; Miss Noyes and myself verified the payments to the various creditors whose names appear on Exhibit 3, either from the bills payable record in the office of the St. Louis Chemical Co. or by the checks by which the payments were made by the company; how many were verified from checks and how many from bills payable record I am unable to state; my recollection is that this exhibit contains all the payments set up in the petition in bankruptcy which has been read here in evidence; but I cannot say how many of those were checks I think the most of them were; there was a very large number of checks that I didn't verify or look over at all; the checks that were verified were segregated from a bunch of checks as we have done here in court, but how many she had I cannot say; I know we verified them as far as we could, and as we verified we checked off on Exhibit 3 just as they appear here now.

Referring to that talk between myself and Alger the first part of March, I asked Mr. Alger to tell me what was the attitude of other creditors toward the Chemical Company of the class that I represented; and he stated to me in detail some creditors that he had seen; and some that he had written to; I cannot give the details of it or anything of it, but he said that he was hoping that he would be able to get them to co-operate with him to carry out the
213 plan that I testified to here on the stand, but he didn't know whether he could or not; that some had agreed to it; that is when he said that the United States Coal Co. had agreed to it

and that he expected to see the Pere Marquette Railroad Co. I asked him if suits had been begun, by any of the general creditors of the company and he said there had not; I asked him if any of the claims were in the hands of local attorneys for collection other than those I represented, and he said there were some claims, and he mentioned them, but I am unable to state which ones he mentioned nor in whose hands they were.

Q. Kindly refer again to that collection register and to collection No. 14,826 and say if there is anything upon that record to indicate whether a bill of lading was attached to that draft or not?

A. There is not.

Witness: The collection register shows that collection number 14,921 touching draft $1,118.75, collection No. 14,983, No. 15,053 as to draft $659.26, No. 15,070, No. 15,086, No. 15,115, 15,204, 15,208 being draft for $671.25; 15,222, No. 15,225, No. 15,271, No. 15,290, No. 15,317, No. 14,872 contain no notation indicating whether a bill of lading was attached to draft or not. Such a notation does appear upon this record under date of 2-12-09 on No. 15,445, also on 15,423; also under date of 7-17-08 No. 14,835; I don't see any more back of the first of July; there is one under date of June 25th.

Recross-examination.

By Mr. Stone:

At the time I was there and talked with Mr. Alger he told me that the company had adopted a plan by which they were to realize on their quick assets, and that they were to pay and retire
214 certain notes that were outstanding in various banks and which notes were secured by collateral bonds which he called treasury bonds.

I don't remember that he said that he had submitted this proposition to all of the creditors of the company, but he said he was submitting it, and intended to submit it to the creditors of the company.

Q. And he asked you to delay until he could find out what the creditors of the company would do in relation to that matter?

A. I don't remember that he put it just that way to me; I have the impression from the conversation that he said that he was going to proceed to do it as soon as he could present the proposition to the creditors. He told me that he had written quite a number, and that he had submitted it to the United States Coal Co.

Q. Did he tell you at that time that the Chemical Company expected to pay all its debts?

A. No, he didn't say that.

Q. Are you sure about that?

A. Yes, sir.

Q. Didn't he tell you that they were temporarily embarrassed by the fact that there was a stringency in the money market, and a consequent falling off in the demand and prices of their product, that he hoped they would be soon bettered by other conditions?

A. No, sir; he didn't in that language.

Q. Did he not tell you that in substance?

A. I would not so regard it, Mr. Stone.

Q. What did he say to you about that?

A. I don't remember that he said anything about the money stringency, the decreased price of their products, but he said on the other hand that they were going to sell them just as fast
215 as they could, get the assets into the market, and carry out the plan that he laid before me. There wasn't any idea in his whole conversation.

Mr. Stone (interrupting): One moment.

Witness: I am answering your question. You asked me what he did say.

Q. I asked you three things, if he said anything about those three things.

A. He didn't put it that way at all.

Q. Now, you say that he didn't tell you at that time that he thought that with careful management they would be able to pay all their debts?

A. No, sir, he didn't. He did not make any claim that they could pay their debts.

Q. He did tell you, did he not, that the reason that they were paying off those notes was to retire the $44,000 of bonds?

A. He did.

Q. When was the first time that you ever heard it questioned but what the $44,000 of bonds was valid and secured by the mortgage?

A. I am unable to answer the question as to when I heard of it.

Q. Did you hear of it any time until during the pendency of the foreclosure proceedings in this Court?

A. I should say I didn't.

Redirect examination.

By Mr. Lyon:

Some time after the petition in bankruptcy was filed, and before the first day of October, 1909, I was there at the office of the St. Louis Chemical Company and saw the directors' record book; it was in the possession of Geo. S. Aldrich, secretary. I saw it in his office in St. Louis; I looked over what purported to be a record of
216 the proceedings of a meeting of March 22d, 1909, and later I had a copy made and certified to by Mr. Aldrich; I think I had the copy made in 1910.

Q. What do you say as to whether or not the purported copy of the resolution attached to the referee's report is a correct copy of the record of that meeting?

A. It is.

Mr. Stone: We don't think that is competent evidence; we haven't got the book, and there is no showing here that the book is lost or destroyed.

Mr. Lyon: Do you know where the book is?

Mr. Stone: I don't. If I did I would have it here.

Witness: I don't know where it is. I have tried hard to find it. I last saw the book at Bay City; I subpœnaed Mr. Aldrich with that book to appear before the referee in bankruptcy at Bay City at the time the testimony was taken, as shown by the referee's return; and I last saw it in the possession of Mr. Aldrich as he left the court room in Bay City. Since that time I have made application to Mr. Aldrich to get it, and he told me Mr. Suydam, who was the receiver of the Chemical Company on the foreclosure proceedings, had it, and I made application to him, and he said Mr. Aldrich had it. They were both positive that the other had it.

(Letter of Feb. 27th, 1909, and letter of March 2d, 1909, were here marked Exhibits P-3 and Q-3 respectively.)

I received these letters through the Michigan Salt Co., or the Port Huron Salt Co., and I won't be certain which. They are written on the letter paper of the St. Louis Chemical Company and bear the stamp of the St. Louis Chemical Co. as written by them from time to time during the date those letters were written.

Mr. Lyon: I offer in evidence Exhibits P-3 and Q-3.

217 Mr. McArthur: The same objection to those letters as we made to the other letters written by the secretary.

The Court: The same ruling.

Mr. McArthur: An exception.

(Mr. Lyon reads Exhibits P-3 and Q-3 to the jury.)

Mr. Lyon: I have been unable to make the proof which I promised the Court to make with reference to Exhibit H-2, and I ask leave to withdraw it, unless I make the proof later on.

Mr. McArthur: No objection to that being withdrawn.

Witness: After Mr. Alger laid his plan before me I told him my clients would not consent to it, and he said I have seen the United States Coal Co. and they have consented to it, and I am going to see the Pere Marquette Railroad Co. in a day or two just the same, and I said so far as the Coal Company was concerned that if they had consented to it that I now withdrew that consent, and had authority to do it, and so far as seeing any of my other clients was concerned, I wanted him to understand that I represented them, and that he needn't see my clients; that it was put in my hands for the purpose of acting, and with authority to act, and that he could take his instructions as to my clients from me. In speaking about the claim of the Pere Marquette Railroad Co., he complained bitterly about freight rates and switching charges, and conditions that made it impossible to do business at St. Louis, and he said that the Railroad Company had now refused to extend them any further credit, and they were now compelled to pay all freight charges in advance before the goods were delivered.

Q. Did he say how long they had been required to do that?

218 Mr. Stone: That is objected to because it is not the best evidence.

Mr. Lyon: It would be the best evidence of what he said.

Mr. Stone: It is not the best evidence of the transaction itself with the company.

The Court: As part of the conversation it may be given.

Mr. Stone: An exception.

A. It was for some time; I can not fix the time, but he gave me to understand that it had been for some time that they had been compelled to pay their freight rates in advance. He said that the claim of the Railroad Company, of $2,312.60, I think it is, was almost exclusively for freight charges and advances made by the Pere Marquette Railroad Co., with connecting lines, and he raised no question as to the correctness of the amount; he gave me the amounts of the claims the same as my clients had sent it to me. I wish to correct my testimony given yesterday as to what he said as to the amount of the bills payable. I was not certain, as you will remember, gentlemen, as to what I said as to what the amount was. Reference to the memorandum made at the time shows that he told me that the bills payable of the company were then $15,000, and that this included $1,700 of notes not secured, as he termed it, by the collateral bonds of the company of the $14,000 of which we have spoken.

Recross-examination.

By Mr. Stone:

I am attorney for the trustee in this case, and I was sworn as a witness before the referee in bankruptcy at the time of the hearing.

219 Q. You went over principally the subjects you have here?

A. Only such part of it as I thought necessary for the purposes of that suit. Mr. Alger, the secretary, was not present at that hearing. His deposition was taken and used in behalf of the bankrupt. Whether we had someone appear at the time of the taking of the deposition I cannot remember; I remember his testimony to some extent.

Q. Whether his attention in his testimony was called to this conversation with you?

Mr. Lyon: I object to that as incompetent and immaterial.

Mr. Stone: I want his recollection about it; that is all. It is negative evidence. If there was anything in there about it I would not care to go into it. Whether Mr. Bahlke has any recollection as to whether Mr. Alger's attention was called on cross-examination to this conversation that he says he had with him.

Mr. Lyon: He was not cross-examined.

The Court: From the deposition—he heard it read—didn't it or did it contain certain things? May you do that by parole?

Mr. Stone: It is proper cross-examination of this witness.

The Court: I don't know of any rule that permits you to go outside of the parol evidence rule, because it is cross-examination.

Mr. Stone: Wouldn't it be competent to show whether the witness'

memory has been refreshed in regard to this conversation at any time by any evidence of Mr. Alger?

The Court: I think it would, but that does not go to the method. I think it is incompetent.

Mr. Stone: An exception.

220 Mr. Lyon: I would like the record to show that Judge Stone is entirely wrong; there is no showing that this witness was cross-examined.

Mr. Stone: An exception to his statement. I would like to have Mr. Lyon sworn and go on the witness stand. I don't want Mr. Bahlke testifying from the witness stand, and Mr. Lyon testifying from his place at the table.

Mr. Lyon: An exception to the conduct of counsel. I am making the objection here that Judge Stone is assuming something not shown, that Mr. Alger was cross-examined. That does not appear yet. It is not yet shown that this witness heard his deposition read or anything of that kind.

Witness: I do not know where Mr. Alger is at present, only by hearsay; he is not in this State, to my knowledge. As attorney for the plaintiff in this case, I have not made any effort to procure his attendance or his evidence to be use here on this trial.

Mr. Lyon: The plaintiff rests.

(Jury excused from the court room.)

Mr. McArthur: It appearing that Mr. Thedgar is ill, I desire to offer in evidence the checks paid by the defendant bank, drawn by the St. Louis Chemical Co. during the months of January, February and March, 1909; I am offering those checks which have not already been introduced in evidence—the remainder of them; it has been consented by counsel that the checks I offer are the checks of the Chemical Company.

Mr. Lyon: I assume that is a fact. I have no objection to making that concession unless something appears to the contrary. But I object to the introduction of them, if the Court please, for the reason that counsel are not entitled to introduce evidence in their

221 own behalf until they take the case and make their opening statement under the rule.

The Court: That has always been the rule, but I think, under the peculiar circumstances of this case, Mr. Thedgar being sick, they may be introduced.

Mr. Lyon: An exception.

Mr. McArthur: We introduce them for the purpose of showing payments during the months of January, February and March.

The Court: If he were here for further cross-examination they probably could offer them.

Mr. Lyon: That will necessitate, before we rest our case, our going and taking the testimony of Mr. Thedgar.

Mr. McArthur: We may avoid it because we may not read that to the jury.

Mr. Lyon: I understand that under the order of the Court receiv-

ing those under the circumstances, that that does not hold us to our resting our case. The Court receiving those checks, we wish to offer some further evidence, not to be technical about it, but for the purpose of showing, so far as we can, the character of that payment. I call the Court's attention to the fact that there is nothing about the checks as they now stand to in any way characterize them as throwing any light upon any of the issues in this case, for the reason that there is nothing to show that they all, or any of them, except in a very few instances, had anything whatsoever to do in any way, shape or manner with the debts of the Chemical Company in the sense in which I use that expression; they made just the ordinary, every-day running expenses of the Chemical Company. And if that is so, that, of course, should not be any notice to the bank or any want of intention upon the part of the Chemical Company to create a preference.

222 The Court: Wouldn't they be entitled to have them all go in and sift out the facts as to what the payments were for? If they are any kind of payments at all, in view of what you put in, wouldn't they be entitled to have them received in evidence?

Mr. Lyon: If your honor takes that view of it, it will necessitate our offering some further proof.

The Court: I think you would be entitled to do that. Can't you agree between you that you reserve the right to put in further proof upon that question?

Mr. Lyon: Yes; I have no objection to that. The proof will show by our ledger and cash book what accounts and expenses those items applied on.

The Court: They may be received under the concession and reservation.

Motion to Direct Verdict.

(Defendant's.)

Mr. Giddings: The defendant now moves the Court to direct a verdict in its favor and against the plaintiff of no cause of action, for the following reasons:

(1) Because, under the evidence submitted, and under the undisputed facts which appear in the case, the plaintiff failed to establish a cause of action.

(2) Because there is no evidence in the case — at the time of the making of the alleged payments and transfers to the defendant the St. Louis Chemical Company was insolvent.

(3) Because there is no evidence in the case that in the making of the said alleged payments it was intended by said bankrupt to give a preference to the defendant.

(4) Because there is no evidence in the case that at the
223 time of the making of said alleged payments the St. Louis Chemical Company had knowledge of its insolvency or made said alleged payments with intent to prefer the defendant.

(5) Because there is no evidence that at the time of the making

of the said alleged payments, or any of them, the defendant had knowledge or notice of the insolvency of said bankrupt, or that said defendant had reasonable cause to believe that it was intended by said payments, or any of them, to give a preference to the defendant.

(6) Because there is no evidence in the case that said St. Louis Chemical Company has made any transfer of its property with intent to hinder, delay or defraud its creditors.

(7) Because under the undisputed evidence in the case it conclusively appears that said alleged payments were not transfers of property within the meaning of the bankruptcy law.

(8) Because it conclusively appears from the evidence in this case that said alleged payments were not transfers of property within the meaning of the bankruptcy law, but on the contrary thereof amounted to more than a set-off of mutual debts and obligations between the bankrupt and the defendant, authorized by the bankruptcy act.

(9) Because it conclusively appears from the evidence that the note held by the defendant against the St. Louis Chemical Company was fully extinguished and satisfied by setting off against the same the credits arising from deposits by said Chemical Company in said bank in the general course of business, and that said set-off and consequent extinguishment of said note was legal and valid and authorized by the bankruptcy act.

(10) Because it appears from the evidence that the deposits in defendant's bank were made in the usual course of business,
224 upon open account, subject to check, and under the law the bank had a lien on said deposits and could legally apply the same in satisfaction of the note held by the same bank, and the voluntary giving of the checks in question by the bankrupt to said bank for the purpose of extinguishing and retiring said note was only the exercise of the right of set-off of mutual debts between the parties, as authorized by the bankruptcy act, and as construed by the Supreme Court of the United States, and therefore not in any sense preferential payments.

(11) Because there is no evidence in the case of any actual intent on the part of the bankrupt to hinder, delay or defraud its creditors.

(12) Because, further, at the time of the filing of the petition in bankruptcy offered in evidence, defendant bank was not a creditor, and therefore not in any sense a party to the bankruptcy proceeding, and such adjudication is not res adjudicata in this case, only to the extent of finding that the St. Louis Chemical Company was a bankrupt at the time of the adjudication.

Mr. Stone: I will add to the tenth reason because it appears without dispute in the case that the note in question held by the defendant against the Chemical Company upon which these payments were applied, was due and past due at the time that the payments were made.

Mr. Lyon: As to that portion of the motion that counsel is under-

taking to make, a defense of the right of set-off that defense is not admissible under the plea of the general issue in this case, that could only be done under notice.

A legal argument here followed between counsel.

225 (A list of checks were here marked respectively Exhibits 5 to 151, both inclusive, except 35, which was not marked.)

Jury returned into Court.

Motion to Direct Verdict Denied.

The Court: I will deny this motion for the present and I will hear you on it at the end of the case. You may proceed and put the rest of your testimony in.

Mr. Stone: An exception.

The Court: I will hear you on all these points before I dispose of the case finally. I think the understanding was that the plaintiff's testimony might be put in later.

Mr. Lyon: Yes.

The Court: At the time that question came up Mr. Lyon said he wanted to put in some further testimony, and it was arranged that he might put that in later; he said he would rest his case with the understanding that if it became necessary he would put it in later; he would have to go to St. Louis to get it.

(Mr. Stone makes opening statement to the jury.)

A. B. DARRAGH, a witness produced and sworn by and on the part of the defendant, testified as follows:

Direct examination:

I reside at St. Louis, Mich. I am 73 years of age. I was cashier of the defendant bank from the time of its organization up to 1900, and since that time I have been its president. I have been engaged in the banking business 44 years. I was representative in Congress from 1901 to 1909. I have also been mayor of the city of St. Louis and treasurer of Gratiot county.

226 I knew of the St. Louis Chemical Company operating in St. Louis. It commenced doing business in 1902 as a New Jersey corporation, and was reorganized the 15th of June, 1907, as shown by the records I have seen. It did business with us continuously from the time of its organization down to the time the petition in bankruptcy was filed. I have before me the ledger account of the St. Louis Chemical Company with our bank from July, 1908, on; and I have made some tabulations as to the total deposits and disbursements during the months from July first on.

Q. What was the total amount of money deposited in your bank by the St. Louis Chemical Company during the month of July, 1908?

Mr. Lyon: All that line of testimony objected to as immaterial.

Court: Overruled and objection and exception may apply to all that line of testimony, both receipts and payments.

A. $7,181.56. There was paid out by checks and vouchers during that month slightly over $5,600. In August, 1908, there were deposited $7,032.10, and the withdrawals were a trifle over $6,800. The deposits in September, 1908, were $6,249.94, and the withdrawals $6,263.27. Deposits of October was $7,686.57, and withdrawals were $7,848.10. Deposits of November were $7,178.67 and withdrawals were $5,739.88. December deposits were $7,391.59 and withdrawals $8,410.11. Deposits for January, 1909, were $5,378.76 and withdrawals were by checks $5,572.61. Deposits for February, $7,136.56 and withdrawals $6,174.29. Deposits during the month of March, 1909, were $9,128.15 and withdrawals $10,531.61. During the month of December, 1908, I was in Washington; in the months of November, October and September prior to that I
227 was in St. Louis. I left for Washington early in December to be there on the first Monday in December, and I was away until about the 6th of March, and after that I was at St. Louis.

Q. You have stated the amount of withdrawals and checks upon this account. I want to ask you if you know in a general way what those checks were drawn for?

Mr. Lyon: I object to the testimony as immaterial and incompetent.

The Court: If he knew at the time that they were drawn, he may answer. I don't think he can answer what he learned since.

A. I know from the checks themselves.

Q. How?

A. From the checks themselves; I can tell.

Q. Have you those checks?

A. Here they are. (Witness produces checks.)

I know that the Chemical Company checked upon this account for their weekly pay-roll. Their pay-roll continued during the months of January, February and March, 1909. They also checked on this account for salaries of officers.

Q. Did that continue during the months of January, February and March?

A. It generally did.

Q. I mean during the months of January, February and March, 1909?

A. Yes.

Q. Now, do you know for what other things they checked upon this account or any other things that they checked upon the account for?

Mr. Lyon: I object to the testimony as immaterial.

The Court: If he knows he may answer. He must be confined to what he knew at that time.

228 A. What better knowledge could a man have than the book record?

The Court: The book record if it is here will show for itself. Your attorneys can simply offer it in evidence.

Mr. Lyon: That is all the knowledge you have, is just the book record?

A. No; I know some things outside of books.

(Last question read as follows: "Q. Now, do you know for what other things they checked upon this account or any other things that they checked upon the account for?")

The Court: You may answer so far as you had personal knowledge of it at the time.

A. They checked, to pay transportation and labor that is not included in the pay-roll, a good many items, salaries, supplies, and for the payment or liquidation of indebtedness.

Q. You produced these checks that have been introduced in evidence, did you?

A. They are here.

Q. I will ask you whether during the years that the Chemical Company has done business in St. Louis you have been in a position to know what its reputation was as to solvency or insolvency?

A. It was considered absolutely——

The Court (interrupting): Answer by yes or no.

A. I know in regard to its reputation for solvency; yes.

Q. What was its reputation?

A. Good.

Q. What was its reputation from July, 1908, on?

Mr. Lyon: I object to it as immaterial and incompetent, and it is not in proper form.

229 The Court: In the form in which it is asked the objection will be sustained.

Q. What was the general reputation of the St. Louis Chemical Company as to solvency during the month of July, 1908?

Mr. Lyon: I object to the testimony as immaterial: in the first place, no preferential payments are involved here before the month of February, 1909, which is several months away; in the next place, it is not shown any of those payments were made to this man as an officer of that bank.

The Court: I think its general reputation for solvency in July is too remote to be of any value. Objection sustained.

Mr. McArthur: An exception.

(The witness was then asked as to the general reputation of the St. Louis Chemical Company for solvency during the months of August, September, October, November and December, 1908, respectively, by separate questions, to each of which questions the plaintiff's counsel interposed the same objections, which objections were sustained by the Court on the same grounds, and to each of which rulings of the Court the defendant's counsel took exception.)

Q. What was the general reputation in St. Louis of the St. Louis Chemical Company as to solvency during the month of January, 1909?

A. Good. Up to that time I had never heard its reputation as to solvency questioned.

Mr. Lyon: I move to strike out the testimony of the witness as to the reputation of this company for solvency in St. Louis in January, 1909, as immaterial, and for the reason that he has stated that during that month he was in Washington, and he could not have knowledge on that subject during that month.

230 The Court: Better find out if he was back during that time.

Q. Were you in St. Louis during that month?

A. I don't think so.

Mr. Lyon: We renew our motion.

The Court: I think I will strike it out unless he shows he had some means of knowing.

Mr. McArthur: An exception.

Witness (interrupting): I was in close touch with the bank by correspondence.

Mr. Lyon: I renew my objection, it being apparent that that — something that he cannot testify to from papers without producing the papers.

The Court: Yes, I think that is true.

A. We have a paper here that we can produce, sir, that covers the month of February.

Mr. McArthur: An exception.

Q. Are you in a position, and do you know what the reputation of the St. Louis Chemical Company was as to solvency during the month of January, 1909?

Mr. Lyon: I object to that as being immaterial under his former answer.

The Court: He has already stated in a general way that he knew. The Court rules that I would strike it out, he being in Washington at the time, unless you show the specific way in which he knows.

Mr. McArthur: An exception.

Witness: I don't think I was back home during the month of February. I had communications from St. Louis while I was in Washington, took newspapers, and had letters from Mr. Church very frequently; I think he sent me statements averaging about once every ten days, somewhere along there, embracing transactions of the bank and the methods, the business that was being transacted, if there was anything unusual.

231 Q. What other communication did you have between Washington and St. Louis during that period of time, if any, aside from your communication with Mr. Church and the reports of the bank and newspapers?

A. I don't now recall any.

Q. During the time that you were away, and from the time you left until you returned, was there anything called to your attention to indicate any change in the financial condition or solvency of the St. Louis Chemical Company?

Mr. Lyon: Objected to as clearly incompetent, it being in writing and the writing being the only evidence, and calling for a conclusion.

The Court: It might or might not be in writing. I cannot tell; he might have had communication by phone or people might have visited him in Washington.

Mr. Bahlke: He stated that the only source of information was the correspondence and the newspapers.

A. I didn't testify to that at all.

The Court: It is negative testimony; he may answer that.

By Mr. Lyon:

Q. Did you have any information upon the subject of any change in the financial condition of the St. Louis Chemical Company during that time except as you may have received it by newspaper or by correspondence?

A. I don't think I had any means of information while I was away except that.

Mr. Lyon: I make the objection it is clearly incompetent because that is the only means of information he had.

The Court: He may answer by yes or no.

Mr. Lyon: An exception.

A. There was not.

I certainly knew of the existence of the $5,000 note in
232 question in this case. I was in St. Louis in September, 1908, but the original note went back of that.

Q. Whether at the time, when this note in question was given, you believed that the St. Louis Chemical Company was financially responsible?

Mr. Lyon: I object to the testimony as immaterial and incompetent, there being no showing that he had any connection whatever with the taking of the note at that time.

The Court: How is it material what their belief was at the time that the note was given?

Mr. McArthur: It is important to know whether the bank acted in good faith as to the solvency in taking the note at this time.

The Court: No one has questioned it here. I have not heard any claim upon the other side that they questioned your honesty in taking the note, or the good faith.

Mr. Lyon: Absolutely no.

The Court: The question of their knowledge of solvency and reasonable cause to believe, that they intended to prefer, all arise from the time of the payments or thereafter. It is presumed that they took the note in good faith.

Mr. Bahlke: It does not appear that they loaned it on the strength of the credit of the company and without endorsers.

Q. Do you know what the general reputation as to solvency of the St. Louis Chemical Company was in St. Louis upon your return to St. Louis in March, 1909?

A. I do.

Q. What was that reputation?

A. It was good. (Witness here produces record of proceedings of the Board of Directors of the defendant bank.)

Mr. Stone: I offer in evidence that portion of the records
233 of the meetings of the Board of Directors of the Gratiot County State Bank occurring on February 8th, 1909, being on page 338, relating to the St. Louis Chemical Company.

Mr. McArthur (reading): Tuesday, February 8th, 1909. Regular meeting of the Board of Directors. Present, Directors Tuger, Harrison and Church. Meeting called to order by Vice-President Tuger at 6 p. m. Minutes of January 23d read and approved. On motion of B. A. Church, a line of credit of $6,000 was granted the St. Louis Sugar Co. and the St. Louis Chemical Company."

Witness: At the time this credit of $6,000 was extended to the Chemical Company the total amount of their notes to the bank was $5,000; that was all the note we had.

I am familiar with the collection register of our bank. About one-half of the collections that came through our bank for collection between July 1st, 1908, and July 1st, 1909, against business men of St. Louis who were financially responsible were refused and returned.

It is a usual custom for outside creditors to draw through our bank upon reputable business men of St. Louis for shipments with bill of lading attached.

I was at St. Louis at the time the Chemical Company plant was constructed and saw it and their properties repeatedly from that time on.

The first building as you came into the grounds was the office building, which didn't amount to much; it was a little frame building. Immediately north of that was what they called the Bleaching Powder Plant, which was never operated; it was a large brick building; immediately north of that was a storehouse, which was a large brick building down near the river bank; then there was the
234 muriatic and sulphuric acid plant, a large building probably 200 by 400 feet; that was frame; the upper chambers were lead chambers; they had a tower for muriatic acid; immediately north of that was the engine house, built of brick, and in the rear of the muriatic acid plant was the salt cake plant; I think it was a frame building. The plant itself was not very expensive; the ovens, however were quite expensive; I think probably there were three, four or five ovens; then they had a stone tower for distillation of their acids, which cost a vast amount of money, I think. In general terms, the plant as it stood constructed, including the wells and the smoke-stack, which cost about ten thousand dollars or over, stood them in about $300,000.

B. A. Church was cashier of the Gratiot County State Bank during the months of January, February and March, 1909.

Q. What have you to say as to whether, in the ordinary course of transacting the business of the bank, if there is any question *to* to

the solvency or responsibility of any person who owes the bank; that fact is reported to you as president of the board of directors?

Mr. Lyon: I object to the testimony as immaterial.

Q. Or was at that time?

Mr. Lyon: The same objection as immaterial, also as incompetent.
The Court: I think he may answer that.
Mr. Lyon: An exception.

A. If I understand the tenor of your question—I might have it repeated to me so that I would know what it covered.
(Question repeated.)
A. Always——
The Court: Answer by yes or no.
A. Yes, if I understand the question. I don't know whether I do or not.

235 Q. I want to ask you whether after your return or at any time during the months of January, February and March there was anything which came to your attention or was reported to you by anyone which led you to suspect that the St. Louis Chemical Company was not financially responsible?

Mr. Lyon: I object to the form of the question as not proper. In January and February he was away, and necessarily it would be in writing under the testimony of the witness, and as to the remainder of it, is merely calling for a conclusion.
The Court: He may answer this question.
Mr. Lyon: An exception.
The Court: I think the answer should be limited to anything that came to him verbally. If there was any writings, it must be shown in writings. You may answer this so far as it came to you verbally in any way.

A. No.
On March 6th, 1909, I entertained the opinion that the assets of the St. Louis Chemical Company were of the value of from $150,000 to $200,000; I hadn't any knowledge as to their liabilities except what they owed to our bank, but I did have in regard to their bonded indebtedness. During the month of March, and after my return, I attended directors' meetings of our bank. I attended a meeting on March 19th; at that meeting there was no discussion of the question of the solvency of the St. Louis Chemical Co. The Chemical Company operated its plant, according to my best recollection, to between April 15th and May 1st.

The first time I received any information to the effect that the St. Louis Chemical Co. was financially involved was soon after the filing of the petition in bankruptcy. I knew the $44,000 of bonds were hypothecated by the new company. The first time that any
236 information came to my attention to the effect that there was any question as to the validity of those bonds in the hands of the new company was when the decision was rendered in this Court to that effect, and not before.

Cross-examination.

By Mr. Lyon:

I did not know of the contest in regard to the validity of those bonds, and that it was on before the decision was rendered. I filed a petition in this Court in the foreclosure case, but not touching the validity of those bonds; it was based upon the decision of the Court one way or the other. Henry Tuger presided at that meeting of February 8th, 1909, as vice-president of that bank. My recollection is that Henry Tuger was elected vice-president of the bank in 1898 or 1899, and acted as such for about ten years afterward. Some years I was in Washington three months, some two months, and some five or six months. During those times Mr. Tuger acted in my place in a perfunctory way. He presided at board meetings. At the time of that meeting, when the resolution was passed, our board consisted of five members.

Q. You knew, did you not, that at that time, and know now, do you not, that at that time it required a two-thirds vote to authorize a loan of $6,000 to the St. Louis Chemical Company by your bank?

A. I knew it at that time and I know it now.

Q. In other words, you knew at that time and know now that three members out of five are not two-thirds?

A. Are not two-thirds.

Q. In other words, you knew that was an invalid and unlawful resolution adopted by the board at that time, did you not?

A. It was not binding upon any one. No money was
237 loaned to the Chemical Company by our bank under that resolution. The capital stock of our bank at that time was $25,000, and had been since the summer of 1907, and we had $5,000 surplus and three or four thousand dollars undivided profits; our total assets were inside of $35,000; our loaning limit to any one person was ten per cent except by vote of two-thirds of the board of directors.

Q. Isn't it the fact that it was your understanding and it was the fact during that time that under the banking law the amount of loan was limited to ten per cent of the capital and surplus?

Mr. Stone: I object to that as immaterial to this issue.

Mr. Lyon: When they offer a resolution in evidence in violation of law as an evidence of good faith, I want to show just what the law is.

The Court: I think it is proper cross-examination.

Mr. Stone: I won't take any exception because I think it is a matter within your discretion.

Q. I ask you if you didn't understand at that time that your bank was limited to loaning to any one person without a resolution of the board of directors to the amount of ten percent of the capital and surplus of the bank?

A. I understood at that time and I understand now that the limit is ten per cent or by a resolution of two-thirds of the board of directors it can be twenty per cent of the capital and surplus.

Q. And that only?
A. That is my understanding of it.
Q. And your capital and surplus at that time?
A. You have the law there; you ought to know what it is. I am not a lawyer, thank the Lord.

238 Q. Your capital and surplus during that time was $30,000?

A. I have already answered that.

Henry Tuger presided at a meeting of the board held on January 23rd, 1909; Tuger, Harrison and Church were present at this meeting.

Q. Did he preside at any meetings held during 1908?
A. Yes, sir.
Q. Upon what dates?

Mr. McArthur: I object to that as immaterial.

Mr. Lyon: I am proposing to show now that Henry Tuger was acting as vice president, and one of the chief executive officers of the bank as bearing upon the new proposition, which counsel for defendant has injected into this case; whether Henry Tuger being a vice president and executive officer of the bank acting as a director of the Chemical Company in fraud of its creditors, for the interests of this bank, if the bank is not chargeable with notice as a matter of law.

Mr. McArthur: The court has already held that any knowledge of the officials of the bank previous to January 1st, 1909, could not be shown.

The Court: I don't remember of holding that; it was on the question of the reputation of the company that that matter was up. I have not ruled that you cannot show knowledge of the officers prior to January 1st. He may answer this question.

Mr. McArthur: An exception.

Witness: He presided at a meeting of the board of—December 11th, 1908, at which time directors Tuger, Harrison and Church were present. He presided at a meeting of December 29th, 1908, at which the same directors were present. He also presided at the annual stockholders' meeting of the bank January 12th, 1909, as he was elected by the stockholders to preside.

239 Mr. Lyon: I offer in evidence the record of the meeting of January 23d, 1909.

Mr. McArthur: We object to that as incompetent and immaterial. It has nothing to do with the St. Louis Chemical Company.

The Court: It may be received.

Mr. McArthur: An exception.

Mr. Lyon (reading): Saturday, January 23d, 1909, special meeting of the board of directors; present, directors Tuger, Harrison and Church; meeting called to order by the cashier, and director; Mr. Tuger elected chairman. On motion of D. E. Harrison I will waive that offer. Letter of January 20th from the State Treasurer read, offering to make this bank a state depositary. On

motion of D. E. Harrison the offer was accepted and the vice president and cashier directed to execute the customary depositary agreement with the State Treasurer and execute such bonds as may be required under the agreement or by the treasurer. On motion the board adjourned. B. A. Church, cashier.

Mr. Lyon: I also offer from the meeting of February 8th, 1909, the following:

Mr. McArthur: The same objection.

The Court: The same ruling.

Mr. McArthur: An exception.

Mr. Lyon (reading): Tuesday, February 8th, 1909. Regular meeting of the board of directors. Present, directors Tuger, Harrison and Church. Meeting called to order by Vice President Tuger at 6 p. m. Minutes of January 23d read and approved. On motion of D. E. Harrison an examining committee, consisting of A. B. Darragh, H. J. Tuger and D. E. Harrison was elected for the current year. Vice president reported depositary agreement and
240 bond for State Treasurer executed, and cashier stated a deposit of $8,000 had been made by the State Treasurer. On motion the board adjourned. B. A. Church, cashier.

Mr. Lyon: I want to show the action of the vice president. From the minutes of January 23rd, 1909, I offer to show the following: I read: The following officers were elected for the ensuing year: A. B. Darragh, president; H. J. Tuger, vice president; B. A. Church, cashier; F. M. Theilgar, assistant cashier.

Witness: The discount number of the note involved here is 25,439. That was approved by the board of directors at a meeting of November 9th, 1908.

I think I can find in our records, if you will give me the time where two payments have been made the same day upon other notes other than the one in question. I am not so sure that I could find where it had been done by the same man owing a note doing it twice upon one day upon two different occasions in reference to the same note.

I had no personal knowledge of the drafts drawn upon the St. Louis Chemical Company between the first day of July, 1908, and the first day of January, 1909, and in regard to their being refused and turned back, except what our records show. I had no personal knowledge of them from being there at the bank at that time; I didn't pay much attention to them.

It was the method of our bank to make a notation on the collection register where drafts were drawn with bill of lading attached, providing it happened to occur to the man who made the entry; that is not a part of our books; that is simply a memorandum.

Q. Was it customary in the keeping of your books to make such a notation upon the book when a bill of lading was sent with draft attached?

241 A. It was customary by the man who made those entries.

I am fairly familiar with the collection register of our bank covering the period from January 1st, 1909, to March 31st,

1909. I don't know what drafts were paid by the St. Louis Chemical Co. at any time from January 1st to March 31st, 1909, without examining it during that period; I can't remember all that truck.

Q. I call your attention to collection No. 15,400 draft drawn by the First National Bank of Omaha, Neb., on the St. Louis Chemical Co. of $202, sight, paid February 5th, 1909, and ask you how that draft was paid?

A. I can not tell without looking up the account of the St. Louis Chemical Co. I don't find the check where it ought to be.

Q. Also look upon collection register at No. 15,180, draft drawn by George J. Roberts against the Chemical Co. November 14th, 1908, and find the check by which that draft was paid?

A. I find the check here; it is check No. 3732.

(Check here referred to was here marked Exhibit R-3.)

Mr. Lyon: After you leave the stand will you see if you can find the check—if a check was used—to pay collection No. 15,400?

A. I will. But it does not necessarily follow that the check was on us. It seems to me I have seen checks on the Commercial Savings Bank.

Q. Didn't they also keep an account at the Old National Bank at Grand Rapids?

A. Possibly.

242 Redirect examination.

By Mr. McArthur:

In 1908 and 1909 the full board of directors of our bank consisted of Mr. Harrison, Mr. Tuger, Mr. Church and myself and William O. Watson, who lives at Breckenridge.

When I was at Washington, there were no other directors but Harrison, Tuger and Church, unless Mr. Watson came from Breckenridge.

Q. You may produce and read the record of the authorization of the original loan of $5,000 to the Chemical Co.

A. July 12th, 1907. Present at the directors' meeting Harrison, Church and Darragh. The record relative to that matter reads: "Application of the St. Louis Chemical Company of St. Louis, Mich., for a line of credit of $5,000, granted on the guarantee of Max Lowenstein, and D. E. Harrison, and their depositing $9,000 of their first mortgage bonds as security for any sums loaned." This is the note of which the present note is the fourth renewal. It was originally given on the 16th day of July, 1907. On the 2nd day of November—14 days prior to the maturity of the note I have just referred to, at a meeting at which I was present I made a motion. It reads this way: "Moved by Director Darragh that the $5,000 note of the St. Louis Chemical Company be held without renewal pending further action by the board" (this board) and that was supported by director Tuger and the motion unanimously prevailed. The directors present were Darragh, Tuger, Harrison and Church. The reason that I offered and we passed the motion was

that because at that time we took the same action with reference to the Sugar Company, and all other notes not specifically, but generally. It was because of the panic of 1907 we would rather
243 hold the note past due if we had to, than to renew it on long time or on three or four months' time. At the next meeting November 27th, moved by Director Tuger that the loan of $5,000 with nine of the bonds of the St. Louis Chemical Company as collateral, and the guarantee of D. E. Harrison and Max Lowenstein for 90 days be made to the St. Louis Chemical Company. That was supported by Mr. Harrison and unanimously carried.

At that meeting there were present directors Tuger, Harrison, Church and Darragh. That is the same note that has been renewed from time to time; we never had any other note. I never heard of any understanding on the part of the board of directors of the St. Louis Chemical Company or any agreement on their part, or of their officers to pay off any particular creditors first.

Q. You have listened to the testimony that has been introduced as to the purpose and intention of the officers of the Chemical Company to pay off certain notes upon which their directors were endorsers, you have heard the testimony?

A. I have heard it, yes.

Q. Was any such intention or did any knowledge of any such intention come to you at any time during or previous to the time of these payments?

Mr. Lyon: I object to that as immaterial.
The Court: He may answer.
Exception.

A. Never.

Q. Did any such information ever come to the knowledge of any officer or employee of your bank, so far as you know?

Mr. Lyon: I object to that as immaterial.
The Court: He may answer so far as he knows.
Exception.

A. It never came to anybody. Such a proposition was
244 never discussed among any of the officers or directors of the bank.

Recross-examination.

By Mr. Lyon:

I think I held 375 shares of stock in the St. Louis Chemical Company during the last half of 1908; and that represented an investment of $3,750. I was also a bondholder in the company. I held one bond of $500, and I held both the stock and the bond down to the 31st day of March, 1909, and during the last half of 1908. Some of the interest coupons coming due on June 1st, 1908, were not met, and some of them were. It didn't meet mine. I think it met a few of those which came due December 1st, 1908; it did not meet mine; did not get mine either for the June or December until after the foreclosure.

Redirect examination.

By Mr. McArthur:

(Three checks were here marked respectively Exhibits 35, 152 and 153.)

Witness: These checks were paid at our bank during the months of January, 1909.

Mr. McArthur: We offer those in evidence to complete some overlooked by us.

I have examined the collection or bill register to ascertain whether or not our records show instances of more than one payment upon a note on the same day. I have found fourteen from November, 1908, to April, 1909. In addition to the real estate that I described yesterday I knew of personal property owned by the St. Louis Chemical Company. They had a large amount of salt cake; they had twenty tank cars; they had a thousand or several thousand
245 carboys; they had of course the material that went into the buildings—the brick, the timber, their commercial acid business, muriatic and sulphuric acid; I am not sure that they had any large quantity on hand at that time, or any quantity for that matter.

Mr. McArthur: That is all except that we have concluded to read to the jury the list of the checks and to whom payable and amounts respectively during the months of January, February and March, 1909, but we won't stop to do it now. They have been introduced in evidence.

The Court: You can do it at any time.

B. A. Church, a witness produced and sworn by and on the part of the defendant, testified as follows:

Direct examination.

By Mr. Stone:

My full name is Bayard A. Church, I reside at Ann Arbor, Mich., and my business is that of a correspondence clerk, and my place of business is in Detroit. During the years 1908 and 1909 I resided at St. Louis, Mich., and I was cashier of the Gratiot County State Bank. My connection with the bank as cashier terminated in June of 1910, and my work as such commenced seven or eight years before that. I was cashier during January, February and March, 1909. I was acquainted with the St. Louis Chemical Company, and had a general knowledge in regard to the company since it was organized and from the time it was doing business in St. Louis; I was in St. Louis at the time it erected its plant and had a general knowledge of the plant and of what it consisted, and also of about what the expense the company was to in erecting the plant, and I
knew its general course of business, what its manufactured
246 product was, and to some extent the material that they purchased from which they manufactured. The St. Louis Chemi-

cal Company were not keeping an open account when I assumed my duties as cashier, but were keeping an account with us in 1907, and they continued to keep an open account with us from that time as long as I was cashier. They kept their account like business people usually did.

I know about the $5,000 note that has been spoken of here, knew of the time of its maturity, and certain payments that were made upon it and the time they were made; I was cashier at the time. During the months of February and March and during the time that those payments were being made, I knew nothing as to any weakened financial condition of the Chemical Company; and I had no knowledge whatever that they were insolvent. I had no knowledge or notice that their condition was any different than it had been during the previous year. Shortly after the note fell due, Mr. Alger said to me that they expected to be able to pay the note in a short time and would prefer to have it remain rather than to renew it. And I was perfectly willing to allow it to so remain. Had I known of any change in their financial condition, or that they were in financial straits I would not have been willing that it should have remained that way. I had no knowledge in relation to other notes in other banks—The Commercial Savings Bank, The Stanton Bank and the Big Rapids Bank—for money loaned to the company, and had no knowledge that any of those notes were endorsed by directors of the company.

Q. Did you have any notice or knowledge during the months of February and March that these payments that were made upon this note, that they were preferring you to other creditors?

247 Mr. Lyon: I object to that as calling for a conclusion; he should state the facts and let the jury draw the conclusion.

The Court: I think that objection good because there might be a dispute between you parties as to what the word preferring means, the jury possibly could not tell from his answer what he meant by it.

Mr. Stone: Possibly that is right.

The Court: You may get that subject-matter, if you put it in different form.

Q. I withdraw that question. Mr. Church, did you have any knowledge at the time these payments were made to you, that there was any intention on the part of the Chemical Company to pay you your note and not to pay its other creditors?

Mr. Lyon: The same objection.

The Court: He may answer that.

Mr. Lyon: An exception.

A. No.

Q. Was there any fact or circumstance brought to your attention that would give you any knowledge that that was their purpose?

Mr. Lyon: I object to that as clearly calling for a conclusion. This jury should draw the conclusion.

The Court: This is negative testimony. He may answer.

Mr. Lyon: An exception.

A. No.

It was the general custom in St. Louis, generally among business houses that were financially responsible, to refuse drafts that were made upon them for collection. And among that class was the St. Louis Chemical Company, that generally refused them, and such had been the custom for years before that. Referring to certain drafts that were presented and paid that were attached to
248 bills of lading for goods, I would say that the presentation of such drafts were common in St. Louis at that time as against people in good standing financially. As cashier of the bank I did not regard the fact that goods were shipped in that manner, with drafts attached to bill of lading as any indication to me that the person to whom the goods were shipped was financially weak or irresponsible. It indicated that the person drawing the draft needed the money.

Cross-examination.

By Mr. Lyon:

I had no knowledge as to the Union Sulphur Company; and had no knowledge that it drew these drafts with bills of lading attached because it needed the money.

Q. Then, so far as the Union Sulphur Company is concerned, you don't mean to say to the jury that the fact that they drew drafts with bill of lading attached, that that was any indication that that company needed the money, do you?

A. No, sir.

Q. Now, did you have anything to do with the drafts or entering up the drafts there in the bank in the latter part—the last half, of 1908, or the first three months of 1909?

A. I had general charge of everything that was done in the bank.

Q. I asked you if you had anything to do with entering up the drafts drawn through your bank during that time?

A. I have no recollection regarding the particular transaction, of the entering up of the drafts drawn through our bank during the last half of 1908 or the first three months of 1909, or of any par-
249 ticular transaction, or whether I had anything to do with the entering upon the record any drafts during that time. I had a general knowledge as to the general method in which those drafts were entered up. It was my intention to have it noted on our collection register when a bill of lading was attached, but it was not always done; it was our general rule to have it done, and such was the general rule which prevailed in our bank during that time. The only way I account for the fact that nineteen of the drafts with bills of lading attached drawn upon the St. Louis Chemical Co. from July 1st, 1908, down to Jan. 15, 1909, escaped such a notation is that like many other unimportant rules, it was not lived up to. I never knew of the Union Sulphur Company shipping goods to the St. Louis Chemical Company without draft with bill of lading attached. It never occurred to me that maybe they did business because the transactions involved large amounts and that they were not

willing to trust the company with the goods? Such an idea never dawned on me. I was a small stockholder in the St. Louis Chemical Company. The last half of 1908 and the first three months of 1909, I think I had fifty shares; I wouldn't be sure. I formerly had more stock than the fifty shares but I think it was sold previous to that date, but the exact date I can not tell off-hand. The annual report of December 31st, 1908, showing 200 shares in my name, but it is no evidence that I owned them; I sold those and very likely the party didn't transfer them at the time. My wife, Carrie M. Church, owned fifty shares at that time; I don't think I was looking after her interests in the company as well as mine; I did look after my own interest in the company. During the last half of 1908 and the first three months of 1909 I did not look after my interests in the company. I did not pay much attention to it. I have no
250 recollection of making any inquiries during that time of anybody as to the financial condition of the company, and have no recollection of doing so during the year 1908; I don't remember of having any discussion with anybody during the year 1908, as to the financial condition of the company, or of hearing anybody discuss the financial condition of the company during that time or during the first three months of 1909 or of asking any one about its financial condition. I knew during that time that Henry J. Tuger was the vice president of our bank, and that in the absence of Mr. Darragh he looked after the interests of the bank as president more or less. He performed the duties of president during the absence of Mr. Darragh when occasion arose; I knew at the same time that he was director of the St. Louis Chemical Company; I also knew that D. E. Harrison was a member of our board of directors, and was the vice president of the St. Louis Chemical Company. The entries of the meeting of February 8th, 1909, are in my handwriting, and I made them at or about the date of the meeting.

Q. At that meeting I see that you, a stockholder in the Chemical Company, and Tuger, director in the Chemical Company, and Harrison, vice president in the Chemical Company, were present and voted a line of credit of $6,000 to the Chemical Company. Now do you claim that you three men there interested in that Chemical Company in that manner voted that line of credit of $6,000 and that nothing was said about its financial condition.

Mr. Stone: My objection is that it is argumentative and it is open to the construction he is asking the witness whether they were there in their capacities as stockholders of the Chemical Company?

The Court: Overruled.

Q. I don't mean that you were there in that capacity, but
251 holding those positions, and acting as director of that bank, do you claim that nothing was said on that occasion touching the financial condition of the Chemical Company?

Mr. Stone: An exception.

A. I recall nothing being said.

Q. Would it be according to the course of the business of the

bank, according to your recollection, that at a meeting like that you men would vote a line of credit of $6,000 to the Chemical Company and nothing be said about its financial condition?

A. Well known concerns——

Q. (Interrupting.) Answer my question. Answer it yes or no. That can be answered by yes or no.

The Court: I think so.

Mr. McArthur: An exception.

A. Yes.

I think there was nothing said on that occasion in reference to the financial condition of the Sugar Company. I recall no discussion on that occasion as to the financial condition of anybody. During the last half of 1908 and the first three months of 1909 I knew that C. H. La Flamboy was a director in the Chemical Company and that Harrison was during the same time; I am not sure whether Fred C. Henry of St. Louis was a director during that time; possibly I did know at the time, but I do not recall about now. I was acquainted with all these men.

I was acquainted with William Hugh, Senior, of Morley, and I have known him three or four years; I know he was a director in the Chemical Company for a time, but at what particular time I am not sure; I think he was a director during the time I have mentioned; I knew what J. W. Pfeiffer was also a director of the Chemical Company, and also Cass T. Wright of Greenville; also that
252 W. H. Cocke was director and president of the Company. I do not know whether M. Lowenstein was a director during the same time or not; I presume I understood at the time something about it, but I don't remember now whether he was or not; I remember of our bank taking the guarantee of Harrison and Lowenstein as backers of the $5,000 note; back in 1907; I don't remember whether Lowenstein was a director or not at that time; I knew he was a stockholder; I understood during the entire existence of this paper that Harrison was a director of the Chemical Company, and the Vice-President of it; I knew of the giving of that guarantee at the time the note was taken into the bank and I kept it up to the time that the note was fully paid; I knew that Cocke was the President of the Company; I don't recall seeing the annual report of the Company showing its condition Dec. 31st, 1908; I have no recollection of making any effort to see what its financial condition was; I don't remember ever to have seen its annual report during 1907; never made any effort to do so; I met Mr. Cocke from time to time there in the city; I could not say whether or not he was away a good deal during the first three months of 1909; I don't especially remember about that, he was no personal friend of mine, I met him in a business way when I was transacting the business of the bank and he was transacting the business of the Chemical Company. I suppose I met him at stockholders' meetings if he was present; I was present at meetings occasionally; I could not say I was at the annual meetings, I probably was at some of them; I could not say who I represented at the meetings aside from myself; I have no special

recollection of being at the annual meeting held in May, 1908; I attended any meetings that I conveniently could of any com-
253 pany that I was interested in; I think I never attended a directors' meeting of the company; this Exhibit C-2 is a letter in the handwriting of Mr. Darragh—that is signed by him; from looking at this letter I cannot recall whether or not I was at that annual meeting of May, 1908, or whether I had the proxy of Mr. Darragh; I will not say I did not, I don't know; it would be in accordance with my course of business to attend if I was in town that day; I should think that the minutes of the stockholders' meeting would show whether or not I was there; that would be the only way I could tell now; I have a recollection of attending some of the stockholders' meetings of that company. I cannot recall whether I attended the annual meeting in May, 1908, or not.

Q. And you have a recollection of attending those before the trouble came up, before these financial troubles came to a head, did you not?

A. Yes.

Q. Now, at those meetings there was furnished to the stockholders, was there not, a financial statement of the condition of the company, read to the gentlemen by the secretary?

A. I don't clearly understand. Do you mean a statement being furnished, with a printed or written statement?

Q. No, not typewritten or printed form or pen or pencil, but at those annual meetings that you attended, didn't Mr. Alger, the secretary of the company, make a verbal report of the financial condition of the company?

A. Let's read the new question.

The Court: This is the whole question; at the meetings did Mr. Alger make a verbal report of the financial condition *of* those stockholders' meetings you attended?

A. Yes.

254 Q. That was the fact, was it not, that he made a report of the condition of that company in 1908?

A. I don't specifically recall that date.

Q. Don't you recall that he made a report of the financial condition of the company at least once before the filing of the petition in bankruptcy in this case?

A. I have no recollection of being present at such a meeting. I think I attended the first stockholders' meeting of the company; at the time of the organization; I suppose the articles of incorporation were read at that meeting, I think I heard them read.

Q. Now, don't you recollect that when those articles of incorporation were read there that it was read to you that over $200,000 was put into that corporation nominally for good will, and only $30 in cash?

Mr. Stone: That is objected to because it assumes something to be true that is not true.

Mr. Lyon: What is not true about it?

Mr. Stone: That $200,000.

Mr. Lyon: How much was that that was put in for good will?

Mr. Stone: It was put in $30 in cash and then a lump sum for the assets of the New Jersey corporation.

Q. Don't you recall that at that first stockholders' meeting the articles were read to you reciting that they put in $30 in cash and $229,211.00 for good-will?

A. I don't recall the figures.

Q. Wasn't that substantially the proportions of the corporation, the way it was launched according to your understanding at that time?

A. No, sir.

Q. At any rate, you do recollect that you heard the statement as to the facts as recited in the articles of incorporation, did you not?

255 A. I think they were read.

Q. Now you carried those facts in your mind, did you not, from that time on?

A. No.

Q. Did you forget them?

A. I cannot remember the whole long articles of incorporation.

Q. I am not asking about that; I am asking about the important part of it; didn't you remember from that time on that you were a stockholder in a corporation with $30 in cash and $229,000 of good-will in it?

A. No.

Q. Did you forget about that?

A. It is not true.

Q. It is not true; why was it put into your articles then. I read that to the jury yesterday from the articles?

A. There is a whole lot more value than $30 went in there; there were all those buildings. I supposed the company kept a set of books, and I suppose they kept an account of what went into the plant.

(Shows witness a book.)

Witness: I never saw the book before, I recognize it as a trial balance book.

Q. Didn't you, as a stockholder of that company, whether you did as cashier of the bank or not, at any time after you heard the articles of incorporation read, didn't you make inquiries of anybody more closely connected with the company than you were, as to what its financial condition and prospects were?

A. I have no recollection of doing so.

Q. Of ever making inquiry; is that right?

A. I recall none.

Q. From the time you heard the articles read down to
256 the time the petition in bankruptcy was filed in 1909 you have no recollection of ever making any inquiry of anybody as to the financial condition of the company; is that right?

A. I don't recall any.

Q. Have you any recollection of ever hearing anybody discuss

the financial condition of that company during that time, anybody connected with the company?

A. I don't recall it.

Q. Do you recall whether or not you ever looked at any of its annual reports, the report of December 31st, 1907, or 1908, you don't remember that either, do you?

A. No, sir.

Q. You don't remember that anybody ever stated to you the substance or the contents of the report of 1907 or 1908?

A. I don't recall it.

We had Dun's Commercial Rating Book in the bank; had it from July, 1907, down to the time the petition in bankruptcy was filed; and I knew that by reference to that book I could see how this company was rated there, but I have no recollection of ever looking at it; I have no recollection of ever looking at it to ascertain the financial standing and commercial rating of anybody in the city of St. Louis; I have no recollection of it, and that is as strong as I will put it. I suppose I met Mr. Cocke once or twice a month and sometimes upon those occasions I would converse with him, probably one or two minutes.

Q. You say you never upon any of those occasions asked him or heard him make any statement in reference to the financial condition or prospects of this company?

A. I didn't say so.

257 Q. As to the fact that you ever did or didn't, if you have any recollection?

A. I don't know. It is a long time ago; I don't specially remember any statements that he may have made; I don't recall any conversation, or recollect any statements he made as to the financial conditions and prospects of the company between July, 1907, and the time that the petition in bankruptcy was filed; I met Mr. Harrison a good deal oftener than I did Mr. Cocke; I would meet him every two or three days, I should say; he was in the clothing business two or three doors north of the bank; he was a member of the examining committee for 1908. The committee was A. B. Darragh, D. E. Harrison and H. J. Tuger; there wasn't any discount committee; during 1908 I think there was only one committee and that was officially designated as the examining committee; that committee sometime had something to do with the discount of paper; it was not a part of my duty as the cashier of the bank during the last half of 1908 and fore part of 1909 to consult Mr. Harrison I think Mr. Harrison could have given me information as to the count of paper; I sometimes consulted him; perhaps once or twice a year; I understood during that time that Mr. Harrison was a wealthy man, worth upwards of $100,000; and I understood at that time that Mr. Lowenstein, the other guarantor on this paper, was also a substantial business man. I thought that both of these men were perfectly responsible for many times this $5,000 note, that was my understanding. Mr. Harrison did his business at our bank during the last half of 1908 and first three months of 1909. Henry J. Tuger was in business there at the same time as a general

merchant, just across the street from our bank, and I met him either as a customer or director of our bank or member of
258 the examining committee every two or three days, and occasionally talked business with him. I also talked with Mr. Harrison from time to time as I met him. I don't remember as I ever asked Mr. Harrison as to the financial condition of the Chemical Co. from 1907 down to the 31st day of March, 1909. I don't remember of ever passing a word with him on that subject. I think Mr. Harrison could have given me information as to the financial condition of the company. Mr. Cocke certainly could have given me such information. I have no doubt that both of these gentlemen could have given me such information if I had asked them. I knew Mr. Alger, and met him frequently in a business way, and talked with him, and I was satisfied in my own mind that Mr. Alger understood fully the financial standing of the company; I don't remember of asking him about it between July, 1907, and March 31st, 1909.

Q. You hadn't any doubt but that if you asked Mr. Alger, he was able to give you, and would give you a statement of the financial condition, and prospects of the company?

A. Yes.

Mr. Stone: I object to that as utterly immaterial and disconnected from any material issue in this case that your Honor can submit to the jury—as to whether or not he had doubts as to whether certain persons could have given him information if he had called for it in regard to the financial condition of the company.

The Court: I think it bears upon the only issue that I shall submit to the jury, if I submit the case to the jury, that this bears upon the only one as the case now stands. I don't know what further testimony may come in. As it now stands it seems to
259 me it bears upon the only question that will be for the jury, if there is a question for them. He may answer.

Mr. Stone: An exception.

Last question read as follows:

Q. You hadn't any doubt but what if you asked Mr. Alger he was able to give you and would give you, a statement of the financial condition and prospects of the company?

A. Yes.

Q. You mean by that, you had no doubt upon that subject, do you? You thought at that time, did you not, that if you asked Mr. Alger about it he could and would give you a statement of the financial condition of the company?

A. Yes, sir.

I think if I had asked Henry Tuger in regard to the financial condition of the company he would have told me all he knew; I recall no talk with him in that regard. I met Fred Henry occasionally, and I think he could have given me information as to the financial condition and prospects of the company during the time I have mentioned; I have no doubt but what he would; I never asked him for any; I don't recall hearing him say anything about it; and I have

no recollection of hearing Mr. Tuger say anything about it during that time.

During the time mentioned I held stock in a company other than the Chemical Co. that Mr. Tuger also held stock in. It was the St. Louis Sugar Co.

(Witness refers to a paper.)

Q. Were you on the board of directors of that company during that time?

A. 1907, I think so.

Q. I notice you have a paper here that you refer to occasionally; what is that?

A. It is mine.

260 Q. I want to see what it is; do you object to my seeing it?

A. You might just as well ask me my business.

Q. Do you object to my seeing that paper that you were referring to before you answered that question.

Mr. McArthur: I object to the question.

The Court: Answer the question.

Mr. McArthur: An exception.

A. Yes, this is a memorandum I made.

Q. I haven't asked you what it is; do you object to my seeing it.

The Court: He says yes.

Mr. Lyon: Then I won't force it, witness.

The Court: That is exactly what the court expected to rule.

Mr. Lyon: Under the rule I am entitled to have him produce it, he having testified from it.

I was on the board of directors of the Sugar Co. during that time, but Mr. Tuger was not. We both held stock in the St. Louis Table Co. which was a St. Louis manufacturing enterprise. Neither of us were upon the board of directors of that company during that time. Harrison and myself were mutually interested in the Sugar Co. He was not on the board of directors of that Co. I think he was a stockholder in the Table Co. during that time, I am not sure as to whether he was on the board of directors. I think Mr. Henry during that time held stock in the Sugar Co.; he was not on the board of directors of that company. Mr. La Flamboy was not a stockholder in the Gratiot County State Bank; I think he still held stock in the St. Louis Sugar Co.; he did at one time; we were not mutually interested in any other company. I don't recall ever asking either Mr. La Flamboy or Mr. Henry for any information as to the financial

261 condition or prospects of the company during the time I have mentioned. And I have no recollection of ever hearing either one of them say a thing about it during that time. Mr. Hugh and myself were not mutually interested in any company except the Chemical Co. so far as I remember; I don't think I ever asked him for any information as to the Chemical Company's prospects and financial condition and I have no recollection of ever hearing him say anything on the subject during that time; Mr. Pfeifler was a stockholder in the Sugar Co., but I could not say at what time; at one

time he was on the board of directors; I don't think he was during the period I have mentioned. I don't recall that I ever asked him for any information touching the financial condition or prospects of the company, or ever heard him make any statement in reference to it; Cass T. Wright was a stockholder in the Sugar Co. and was on the board of directors at one time, and during the time in question; I have no recollection of any conversation with him in reference to the financial condition or prospects of the Chemical Company during that time, and I don't remember hearing him make any statement in regard to it; I was not interested in any other company with Mr. Lowenstein, and I recall no conversation with him during that time in reference to the Chemical Company.

During the last half of 1908 and the first three months of 1909 I knew the general character of the business of the St. Louis Chemical Co., but did not know the general course of its business. I presume that some of the drafts drawn by the Union Sulphur Co. with bills of lading attached were paid to me, but I have no recollection of any specific draft.

Our bank held among its collections during the last half of 1908 and the first three months of 1909, a note given by the Chemical company to Henry J. Tuger.

262 Q. It appears in evidence here that Henry J. Tuger held a note of the same amount against the Chemical Company and from time to time as he received payments from the Chemical Company he took them to your bank and had them endorsed upon that note which your bank held for collection; do you remember whether any of those checks were presented to you or did they go to Mr. Thedgar?

A. If your statement of the case is right there would not be any checks go to the bank at all, either to Mr. Thedgar or to me. Mr. Thedgar (Mr. Tuger), received some money from the Chemical Company and came over and had us hand back this collection that he owned and he made an endorsement on it or directed us to make an endorsement for him; there would be no money transaction at all in that case.

Q. Did he present those checks to you or were they presented to Mr. Thedgar?

A. They weren't presented to anyone according to your statement.

Q. Did Mr. Tuger present any checks during the time I have referred to drawn by the Chemical Company in his favor to you or were they presented to Mr. Thedgar?

A. I don't think Mr. Tuger often brought over deposits; they would come over in his regular deposit and one of the girls usually brought the book over for deposit. I think Mr. Tuger did bring some checks to me and the amount was endorsed on that $2,500 note; I cannot tell how many of those checks were presented to me; I cannot tell within a month when they commenced.

Q. Would you have any recollection as to whether they occurred during the year 1909 at all or not?

A. (Consulting memorandum.) Yes, some time during 1909.

263 Q. What paper are you referring to — refresh your recollection?

A. To the date on which the petition in bankruptcy of the Chemical Company was filed.

Q. What was that date according to your recollection?

A. (Consulting memorandum.) The information I have, it says that it was June 25th, 1909. So it must have been that year. I didn't remember whether it was 1909 or 1908.

Q. You could not tell the year in which the bankruptcy proceedings were begun without referring to that memorandum, could you?

A. Some information.

Q. Answer that question, please, you could not tell the year that the bankruptcy petition was filed without reference to the paper you just put back in your pocket, could you?

A. Yes, sir.

Q. Why do you refer to it?

A. Because I knew the information was on this paper.

Q. What do you say as to whether or not during the February and March before the 25th of June, 1909, whether Henry J. Tuger presented any of those checks to you personally; you say you think he did?

A. I think so.

Q. Could you tell about when they were presented, whether the forepart of February or not?

A. No, sir.

Q. How many times did he present those checks to you?

A. I don't know.

Q. You knew at that time he was a stockholder in the company?

264 A. Yes, sir.

Q. You knew at that time that draft after draft of this company had been turned down and refused by the company and returned by your bank, did you not?

A. Some drafts had been returned.

Q. You knew a great many had been returned since the first of July previous?

A. I don't know that there was a great many; I have no recollection that on some of the days that Tuger presented checks drawn by the Chemical Co. for payment on this note that the company were refusing to pay drafts drawn through our bank; I might have known it at that time; I don't now recall any instance during that time that the Chemical Company notes were being protested at our bank, because of its refusal to pay them; I had no reason during that time from July 1, 1908, down to March 31, 1909, to question the fact that the Chemical Company owed the amounts of those drafts that were drawn upon it through our bank, and refused at the bank.

Q. Did you have any reason during that time to question the fact that the Chemical Company owed, fairly and honestly owed the notes which were presented to your bank for payment during that time and payment refused by the Chemical Company and the notes protested in consequence of non-payment?

A. I don't now recall any notes being protested.

Q. It appears in evidence here that some notes were presented to your bank for payment during the time I have referred to, notes given by the Chemical Company and payment was refused and the notes went to protest; now do you remember of the fact being called to your attention during that time?

A. I don't remember that any notes went to protest.

Q. It appears there were; you don't claim, do you, to have
265 any recollection that any question was made upon the part of the Chemical Company but what it fairly and honestly owed those notes?

A. I have no recollection of the notes, any notes going to protest.

Q. You have no recollection of any question being raised upon the part of the Chemical Company but what it owed the notes presented to your bank during that time and payment refused by the company?

A. I have no recollection of any notes having gone to protest.

Q. Then certainly you have no recollection of any claim being made by the Chemical Company during that time, but what all paper that went to protest in your bank or was refused by the company, but what all paper represented honest, bona fide debts of the company?

Mr. McArthur: Objected to as argumentative.

The Court: The same ruling I have made twice before to the same question. He may answer the question.

Mr. McArthur: An exception.

A. I have no recollection to my knowledge.

It was my understanding that at about the time that payments were being made on our $5,000 note, that the Chemical Company were making payments upon the Henry Tuger note which we held for collection—approximately the same time; I have no special recollection about checks going through our bank making payments upon paper held by the Commercial Savings Bank; I cannot recall what I understood five years ago; my memory does not carry me back that far about something that I was not interested in; I don't specifically remember about drafts being bought by the Chemical Company in favor of the Stanton Bank; I don't recall that any
266 of those drafts were drawn to my attention; I don't remember drawing drafts for them, but I drew ten or fifteen a day for years; I have no recollection on the subject. I don't know whether or not any of the checks which were drawn in favor of William Hugh during that time went through my hands. I have no recollection on the subject. When Mr. Thedgar received checks and made applications upon our note or the Tuger note or issued a draft for the Stanton Savings Bank he was acting in the same capacity as I would have acted if I had transacted the business; I have no recollection of ever discussing with Mr. Thedgar in any way, shape or manner the financial condition of the Chemical Company during that time; and I have no recollection now of ever having made any inquiry or passed a word with anybody as to the

financial condition of the Chemical Company from the first day of July, 1908, to the 31st day of March, 1909; and I think that would be true from the middle of July, 1907, down to the 31st of March, 1909; I considered Mr. Harrison and Mr. Lowenstein as perfectly good many times over for this $5,000 note that they were back of during the month of January, 1909; and that was true during February, 1909.

I cannot say the exact date that Alger spoke to me about making payments on this note; it was in the bank and it was within three or four days of the time the note was due (consulting memorandum); it was due January 25th, 1909; no one was present besides Mr. Alger and myself as far as I can remember. Mr. Alger commenced the conversation; I didn't ask him to pay the note; it is my recollection he simply said that they expected to commence to pay the note in a short time; I have no recollection that he told me that they were going to retire all the notes held by the bank; when he told me that I said if they were going to pay it in a short time that would be all right; I don't recall that there was anything
267 more to be said; I have no recollection of anything more being said; I cannot tell what day of the week, what day of the month or what time in the day this conversation occurred; I have no specific recollection how recently I had seen Mr. Alger to talk with him before that; I don't recall whether I had seen him within a week before that and talked with him; I cannot recall seeing him within a month before that to give the exact words of the conversation; I don't think within a month before that time I had had any talk with him in reference to the financial condition or prospects of the Chemical Company.

Q. Did you have any talk with him within a week after that time that you claim you had this conversation?

A. About the condition of the Chemical Company?

Q. I have put absolutely no limit on the subject; did you have any talk with Mr. Alger within a week after you say you had this conversation in reference to this note, that you remember?

A. Not as to the exact conversation, no.

Q. Did you have any conversation with him within a month after he was there in reference to the financial condition or prospects of the company?

A. I think not.

Collection No. 15310 was received within a day or two of December 28th, 1908; the owner of the collection was Fred Biddlecomb; he resided there in the city; I knew him; he was a retired farmer; it was for $15; I don't know whether it was for an interest coupon which came due December 1st, 1908, or not; I don't know whether he held bonds in the St. Louis Chemical Company or not; it was kept and returned July 28th, 1909.

Collection 14782 was received by the bank shortly after
268 July 1st, 1908; I suppose it was an interest coupon representing some interest on the bonds of this company; that is what the record shows; I don't know when it became due; presum-

ably dated June 1st, 1908; it was a coupon left at our bank for collection against the company of $15 in favor of Mr. Biddlecomb; probably the reason I checked down the word "st" for "sight" was because it was payable at the Chemical Company's office and would not be due until it was presented; it was returned July 28th, 1909; I presume I understood at the time that those were two interest coupons for interest that came due respectively June first and December first, 1908, upon the bonds of the company.

Q. Those interest coupons were payable at your bank, were they not?

A. I don't know.

Q. Didn't you know that the company passed its interest payment which came due the first of June, 1908?

A. I don't remember it now; I may have known it at the time if it is true.

Q. Did you know whether or not they were able to meet the debt, meet their interest coupons which came due December first, 1908?

A. I think they met some of them.

Q. And some of them they didn't, did they?

A. I believe there was some that weren't paid at that time.

Q. And some of them they met and some of them they refused to pay, did they not, according to your understanding at that time, or staved them off, didn't meet them as they did the others?

A. I think there was some that weren't paid at that time.

Q. They were presented for payment and the company staved them off and deferred payment, didn't they?

269 A. I think they requested an extension of time on some of them.

Mr. Stone: We desire to refer to the foreclosure files and mortgage as to where the interest coupons were payable.

The Court: They are in evidence.

Mr. Lyon: The ledger pages, they were treated in evidence down to the 31st of March, 1909?

Mr. Giddings: Commencing when?

Mr. Lyon: They commence July 1st, 1908. I objected to one sheet as immaterial, after the time these payments were made, after March 31st, 1909.

Mr. Giddings: Then it is conceded that sheets number- 1, 2 and 3 marked Exhibit 1 on sheet one showing the individual account of the St. Louis Chemical Company with the Gratiot County State Bank is in evidence?

Mr. Lyon: Down to and including March 31st, 1909.

Mr. Giddings: Yes.

Mr. Stone: We offer in evidence that individual account, being sheet number 4, including the months of April, May and June.

Mr. Lyon: I object to that as immaterial.

The Court: I will admit this.

Mr. Lyon: An exception.

(Exhibit 1 was here remarked sheets 1, 2, 3 and 4.)

Mr. McArthur: We desire to read those checks to the jury.

The Court: Yes, that is understood; you can do that at any time.

Mr. Stone: I withdraw my offer made of the account as to the part of it after the last payment of checks to our bank.

Mr. Lyon: Then I offer in evidence the several entries in
270 the cash book of the St. Louis Chemical Company from January 1st, 1909, to and including March 31st, 1909, for the purpose of showing the purpose for which those checks were issued.

Mr. McArthur: I object to it for the reason the book has not been proven or the correctness of the entries testified to and without explanation as to what those entries mean the book cannot show the purpose for which they were drawn.

Mr. Stone: It is disconnected from any question here that touches the defendant bank.

The Court: I think it is proper and will be received.

Mr. Stone: An exception.

Mr. Lyon: And in that connection I will also offer in evidence the entries from the Chemical Company ledger so far as the items appearing on the ledger correspond with the items in the check and the cash book as throwing light upon the nature and purpose of those checks.

Mr. McArthur: The same objection.

The Court: The same ruling.

Mr. Lyon: Is it the understanding that they are to read these checks to the jury?

Mr. McArthur: Yes, a synopsis of them is all I care to read.

Mr. Lyon: If that is done we shall want to get before the jury in some way at some time a statement upon our cash book covering the same ground as to the purpose of those checks.

Mr. Stone: If it is the proposition of Mr. Lyon to read something as to the purpose of the checks and which does not appear upon the face of the checks—something extrinsic to the checks themselves—we wish to make the objection that under the issue as we understand may be submitted to the jury because the evi-
271 dence of what that book contains made by the Chemical Company has not by any evidence been brought home to the bank. The check itself is what is there.

The Court: Under the proposition that I shall probably submit to the jury it will be a question of whether the bank had reasonable cause to believe or not. In other words, reasonable cause to make inquiry but I would think that whatever appears in the books of the company might bear on that question as to what they might have found had they made inquiry.

Mr. Stone: An exception.

The following checks were read to the jury by defendant's counsel as follows:

The first herein shown is the date of the checks drawn by its vice president and treasurer, followed by the person to whom it is given, then followed by the amount of the check, and following that, the date when it was paid, and lastly, in some instances, with any out of the ordinary statements upon the face of the check.

1908. December			1909. Januar
21.	E. H. Horton	$15.90	6
			Februar
22.	F. C. Henry	35.00	9
			Januar
24.	Joint Rate Inspection Bureau	120.00	5
30.	P. M. R. R., charges on cars of *salt*	44.58	2
1909. January			
2.	Union Sulphur Co., payable to draft	671.25	2
2.	P. M. R. R., freight car sulphur	87.36	3
2.	P. M. R. R.	35.85	3
2.	L. B. Alger	100.00	4
2.	Handy Bros. Min. Co.	100.00	7
4.	Cash payroll	214.55	4
272			
5.	P. M. R. R.	88.29	7
5.	H. H. Pebbles, C. N. & St. P. R. R.	8.00	9
6.	P. M. R. R., freight 3 cars salt	63.00	7
1908.			1909.
6.	A. E. Hotson	75.00	7
1909.			1909.
6.	H. M. Pebbles, agt. C. N. & St. P. R. R.	99.15	9
7.	May La Flamboy	25.00	9
9.	P. M. R. R., freight	232.53	9
9.	H. B. Giddings	45.26	11
9.	Harvey Cheddister, labor	6.34	11
9.	Wm. Hugh, Sr.	31.95	11
11.	Gratiot Co. St. Bk., car load sulphur	559.38	11
11.	P. M. R. R., freight	22.02	12
11.	P. M. R. R., freight	72.80	12
12.	A. H. Lowrie, express agent	33.80	13
12.	Aldrich & May, insurance	8.75	13
12.	Geo. M. Adams, labor	15.60	12
13.	P. M. R. R., freight	22.14	14
13.	F. Button	1.00	14
13.	Cash, payroll	233.70	13
13.	Willis Broman, labor	2.36	13
13.	Harvey Cheddister, labor	2.38	15
13.	Geo. Hill, labor	2.38	14

1908.			1909.
13.	P. E. Modin, labor	50.00	15
1909.			1909.
14.	Nate Harrison, teaming	17.48	14
15.	P. M. R. R., freight	90.18	15
15.	L. B. Alger	100.00	14
15.	D. E. Harrison, bond int.	160.13	16
16.	Willis Broman, labor	2.57	16
16.	Wm. Hugh, Jr.	22.01	16
16.	H. J. Tuger	10.00	18
16.	Cash, stationery	10.75	18
273			
16.	L. B. Alger	35.00	18
18.	P. M. R. R., freight	56.09	20
19.	Handy Bros. Min. Co.	105.74	22
20.	P. M. R. R.	146.96	20
20.	Cash, payroll	316.60	20
21.	P. M. R. R., freight	93.62	21
21.	St. Louis Hardware Co.	21.68	21
22.	P. M. R. R., freight	20.50	23
23.	P. M. R. R., freight	28.49	25
23.	E. A. Hotson, employee	75.00	25
	P. M. R. R., freight	71.91	25
25.	P. E. Modin, employee	100.00	28
25.	Vern Colburn, labor	5.70	26
28.	P. M. R. R., freight	24.44	28
28.	Gratiot Co. St. Bk., Union Sulphur Co. draft	559.38	28
28.	P. M. R. R., freight	92.00	
28.	Cash, payroll	317.85	28
			February
29.	Mineral Point Zinc Co., material	315.45	4
30.	Standard Steel Tube Co.	32.65	4
February			
3.	H. C. McClurg Co.	30.00	8
3.	P. M. R. R., freight	15.52	5
4.	Envelopes and stamps	11.72	4
4.	Cash, payroll	258.06	4
4.	A. E. Hotson, employee	75.00	6
4.	Oscar Wilson, labor	4.69	23
4.	Jacob Jones, labor	3.85	4
4.	P. E. Modin, employee	75.00	8
4.	J. W. Bernard & Son	7.37	10
4.	Holland Furnace Co.	133.00	9
4.	John L. Boss & Co.	32.97	11
4.	Gratiot Co. St. Bk., interest	116.67	5
4.	Gratiot Co. St. Bk., interest	58.34	5

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4.	Gratiot Co. St. Bk., interest	400.00	5
5.	May Latlamboy	25.00	5
8.	Com. Savings Bank, interest	87.50	8
8.	F. C. Henry	100.00	9

Mr. Lyon: In connection with that we offer cash book to show that the $87.50 is the interest on the $2,500 note January 18th, 1909.

Mr. Stone: We object to it as it is no evidence that came before the defendant bank at all.

The Court: It may be received.

Mr. Stone: An exception.

Mr. McArthur (continuing):

1909. February			1909. February
8.	F. C. Henry	200.00	9
8.	Gratiot Co. State Bank	300.00	8
11.	P. M. R. R., freight	35.11	15
11.	Cash, payroll	239.30	11
11.	F. C. Henry	200.00	12
11.	Gratiot Co. State Bank	200.00	11

Mr. Stone: Will it be conceded that they paid their payroll weekly? The checks show it.

Mr. Lyon: I will concede it.

Mr. McArthur (continuing):

1909. February			1909. February
13.	P. M. R. R. freight	72.85	15
15.	Gratiot Co. State Bank	100.00	15
15.	L. B. Alger	50.00	15
15.	Union Tel. Co.	9.30	26
16.	P. M. R. R., freight	103.70	16

			1909. March
1.	M. Lowenstein	80.25	5

Mr. Lyon: I would like to show from the cash book that it appears thereon to be interest, M. Lowenstein, coupons, $80.35.

Mr. Stone: We object to it.

275 The Court: The same ruling.

Mr. Stone: An exception.

Mr. McArthur (continuing):

1909. February			1909. February
1.	Gratiot Co. State Bank	$208.65	23
17.	P. M. R. R., freight	37.11	17
19.	Cash, payroll	231.90	20
20.	Gratiot Co. State Bank	300.00	23
23.	P. M. R. R., freight	89.56	23
23.	Perry Henry	40.40	23
			March
23.	Secretary of State	.50	1
			February
23.	Gratiot Co. State Bank	30.75	23
23.	L. C. Palmer, attorney	25.00	27
23.	A. E. Hotson, employee	150.00	24
23.	Handy Bros. Min. Co.	10.52	26
23.	A. H. Lowrie, express	7.69	26
23.	St. Louis Hardware Co., past due note	200.00	26
23.	Tyrollers Emporium	1.93	25
23.	C. W. Satterlee	1.00	27
			March
23.	A. S. McIntyre	13.62	1
			February
23.	J. A. Burgiss	6.61	26
23.	G. W. Barnard & Son, in full to date	55.13	26
23.	Humphrey & Brockway	4.73	27

Mr. Lyon: Will it be conceded that the last seven checks were to St. Louis people?

Mr. Giddings: Yes.

23.	Union Tel. Co.	12.00	26
25.	P. M. R. R., freight	61.48	25
			March
23.	W. H. Smith	4.50	16

276 Mr. Giddings: He lives in the country adjoining St. Louis.

24.	J. W. Pfeifler	3.48	2
			February
25.	Cash, payroll	230.25	25
26.	Phillips & Long, to apply on $500 note due February 6th	190.00	26
25.	Fred Kemp	1.50	26
26.	L. B. Alger	50.00	26

1909. March			1909. March
1.	Cash, envelope	10.72	1
2.	Nate Harris, an employee	13.10	2
2.	May Latlamboy	25.00	4
3.	I. Witherill	11.85	3
4.	L. B. Alger	125.00	4
4.	Cash, payroll	174.25	5
4.	C. H. Latlamboy, salary	25.00	13
5.	P. M. R. R., freight	1.09	6
6.	Ed Rath	16.20	8
9.	Dick Terwilliger	14.00	10
9.	Nelson Harris, St. Louis man	8.10	10
11.	P. M. R. R., freight	29.53	11
11.	Jacob Jones, payroll	5.15	12
12.	Cash, payroll	155.35	12
12.	C. H. Latlamboy	227.36	12
12.	Aldrich & Mey, apply past due note	125.00	12
13.	A. H. Lowrie, express	7.61	28
13.	Perry Henry	8.35	16
15.	Frank Moon	15.50	15
15.	Geo. Howland	12.50	15
15.	Geo. Bailey	13.75	15
15.	Chas. Housel	8.75	15
15.	Geo. Hill, payroll	14.45	17
15.	J. W. Pfeiffer, traveling expenses	125.00	19
15.	Cass T. Wright	50.00	22

277 Mr. Lyon: I offer in connection with the Witherill check item in cash book March 3, payroll, I. Witherill, $11.85.

Mr. Stone: We object to it.

The Court: I will receive it.

Mr. Stone: An exception.

Mr. McArthur (continuing):

15.	W. M. Barstow	20.00	20
15.	L. B. Alger	53.23	17
17.	Payroll	61.00	18
17.	P. M. R. R., freight	58.47	19
20.	P. M. R. R.	.....	20
20.	Ben Lane, labor, St. Louis man	109.33	24
20.	C. H. Latlamboy	33.89	20
20.	F. R. Messenger	1.25	29
22.	W. H. Cocke	35.00	23

Mr. Lyon: In connection with those items of Pfeiffer and Cass T. Wright back there, I would like to offer from the cash book under date of March 15th, traveling expenses J. W. Pfeiffer and C. T. Wright, $175.

23.	P. M. R. R., freight	27.16	29
23.	Geo. Carmer, labor	1.50	25
23.	Geo. Bailey, labor	1.35	24
24.	Handy Bros. Gin. Co.	12.40	31
24.	Cash, office expenses	10.72	25
25.	Cash, payroll	57.25	27
26.	L. B. Alger	50.00	26

Mr. Lyon: In connection with Exhibit 47, the checks to the Holland Furnace Co., $133, I read from the cash book of the company under date of Feb. 4th, 1909, C. H. Latlamboy check to Holland Furnace Co., $133, together with the ledger account of C. H. Latlamboy that that amount was charged to him in his account under date of February 4th, folio 39 being the corresponding page of the
278 cash book, for the purpose of showing that that was a payment to an employee of the company.

Mr. Darragh: I knew at the time that Latlamboy was an employee of the company.

Mr. Stone: We would like the record to show that Mr. Thedgar, the plaintiff's witness, after the direct examination, went to his home in St. Louis and on account of his serious sickness has not been so that we had an opportunity to cross-examine him. We don't want it to appear that we purposely refused to cross-examine him.

The Court: It is conceded by everybody that he has been sick since that time. The record already shows that no one asked for a continuance on account of it.

Mr. Giddings: We agreed to go on without him.

The Court: It was understood that you would go on with what testimony was in.

Motion of Defendant Renewed to Direct Verdict.

Mr. McArthur: We desire to renew at this time our motion to direct a verdict upon the same grounds as were stated in our motion at the conclusion of the plaintiff's proofs.

(Argument on the law involved in the case.)

Motion to Direct Verdict (Plaintiff's).

Mr. Lyon: The plaintiff at this time moves the court to direct a verdict in favor of the plaintiff upon the ground that prior to the time of the making of those payments in question, under the
279 undisputed testimony in this case the St. Louis Chemical Company entered upon a scheme which was fraudulent in fact and in law to prefer certain of its creditors, namely, creditors upon whose paper the directors of that company were back of or were holding the paper themselves and that this bank was on notice of that fraudulent purpose upon the part of the Chemical Company and that the deposits were made in this bank and paid through this bank for the purpose of carrying out that plan and that for that

reason that the plaintiff is entitled to recover in this case. It didn't need to have reason to believe; it simply needed to have knowledge of such facts as would put an ordinarily prudent man upon inquiry.

The Court: Is there any difference between reason to believe and such facts as would put a man on inquiry?

Mr. Lyon: No, one is equivalent to the other, and we contend that Henry J. Tuger, who testifies that this arrangement was made to do just what was done and that when he presided at a meeting of the directors of that bank as vice president of that bank, one of the executive officers of the bank in the absence of the president, Mr. Darragh, that all the time and during the time he presided at that meeting with a director of the Chemical Company, Mr. Harrison sitting as a member of that bank and Mr. Church as stockholder in the bank, they there having under consideration the question of extending credit to the St. Louis Chemical Company and passing the resolution which they did, that at that time and from that time on the bank was chargeable with notice as a matter of law of the arrangement, of the unlawful arrangement which this company had entered into by and through its directors or executive officers with the consent of the directors, and that all payments made since that time that were received with notice of the purpose upon the part of the Chem-
280 ical Company to take care of those creditors to the exclusion of others who from day to day it was turning down through this bank, and that for that reason we are entitled to recover those amounts by direction of the Court to this jury.

Motion to Direct Verdict (Plaintiff's) Denied.

The Court: For the present I will deny both motions. I would like to have each draw requests particularly upon the question of Mr. Tuger's knowledge, and I will look them over and determine the matter in the morning.

Mr. Lyon: I would like to add a second ground to my motion, and that is that under the state of facts that existed as to the intention of the Chemical Company, that notice to the bank was not necessary, it not being a good faith purchaser for a present fair consideration under 67-E of the bankruptcy act.

The Court: On that branch of the motion the Court will deny it. I am of the opinion that 67-E does not apply in this case.

Mr. Lyon: An exception.

The Court: Give both sides an exception as to all the motions to direct a verdict.

Mr. Stone: An exception as to that last ruling.

The Court: The Court has finally concluded that he will charge the jury, that the knowledge of Tuger was not the knowledge of the bank, but I shall permit the jury to consider all the facts and circumstances in connection with the transactions, and determine whether or not the executive officers of the bank did learn of the facts that Tuger knew, and I shall also hold in effect that the bank must have acted in bad faith; that it requires something more than

281 merely to put them on enquiry, but that they must have had such knowledge or notice as put them in the light of acting in bad faith from the time that the yhad the notice.

Plaintiff's Requests to Charge.

(Title of Court and Cause.)

Plaintiff, by his attorneys, requests the Court to charge the jury as follows:

4. Henry J. Tuger, one of the directors of the Chemical Company, was the vice-president of the Gratiot County State Bank at the time when said plan was agreed upon and carried out in part he had full notice and knowledge of the unlawful plan, and as he was not acting adversely of the defendant such knowledge on his part was the knowledge of and notice to the bank. Therefore, I direct a verdict for plaintiff for $4,682.53, being the anounts paid to the bank from and including February 26th to and including March 31st, 1909, and the interest thereon at 5% from the date of the commencement of this suit, August 2nd, 1909.

Refused.

K. S. S.

If the Court refuses to charge as requested in the 4th request, then he is requested to charge as follows:

5. If such facts were brought to the knowledge or notice of the executive officers of the defendant bank as would lead an ordinarily prudent man to inquire whether, in making the payments complained of, the Chemical Company intended to prefer the bank over any of its other creditors, then such payments were unlawful preferences and plaintiff is entitled to recover.

Refused.

K. S. S.

6. That the scheme or plan of the St. Louis Chemical Com-
282 pany set forth in the third request to charge being a fraud upon its general creditors, that the defendant can retain the preferential payments made to it only when it received such payments in good faith without knowledge or notice of such fraud. If it had knowledge of such fraud on the part of the St. Louis Chemical Company or had notice of such facts and circumstances in regard thereto as would have put a reasonably prudent man upon inquiry, then the defendant would be chargeable with knowledge of such facts regarding such fraud as would have been disclosed to the defendant thereby to the like force and effect as though knowledge of such fraudulent scheme or plan were known by it from its inception.

Refused.

K. S. S.

Defendant's Request to Charge.

(Title of Court and Cause.)

Now comes the said defendant, by C. W. Giddings, its attorney, and requests the Court to charge the jury in the above entitled cause as follows:

(1.)

I charge you that under the evidence submitted in this case, and under the undisputed facts which have been proven, the plaintiff has failed to prove a cause of action under his declaration, and your verdict must be for the defendant.

(2.)

I charge you that the burden of proof is upon the plaintiff in this case to establish by a fair preponderance of the evidence that at the time of the making of the several alleged payments to the de-
283 fendant as set forth in plaintiff's declaration, the St. Louis Chemical Company was insolvent.

(3.)

I charge you that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that at the time of the making of the alleged payments set forth in the plaintiff's declaration, the St. Louis Chemical Company had knowledge of its insolvency, and intended by said payments to give a preference to the defendant.

(4.)

I charge you that there is no evidence in the case that in the making of said alleged payments, it was intended by the St. Louis Chemical Company, bankrupt, to give a preference to the defendant and your verdict must be for the defendant.

(5.)

I charge you that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that at the time of the making of the said alleged payments, it was intended by said St. Louis Chemical Company, bankrupt, to give a preference to the defendant.

(6.)

I charge you that there is no evidence in the case that the St. Louis Chemical Company, bankrupt, at the time of the making of the said alleged payments had knowledge of its insolvency or made

the same with intent to prefer the defendant, and your verdict must be for the defendant.

7.

I charge you that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the St. Louis Chemical Company, bankrupt, at the time of the making of
284 the said alleged payments had knowledge of its insolvency and made the same with intent to prefer the defendant.

(8.)

I charge you that there is no evidence in the case that at the time of the making of the said alleged payments or any of them the defendant had knowledge or notice of the insolvency of said bankrupt or said defendant had reasonable cause to believe it was intended by said payments or any of them to give a preference to the defendant, and your verdict must be for the defendant.

(9.)

I charge you that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that at the time of the making of each of said alleged payments the defendant had notice or knowledge of the insolvency of said bankrupt, or that defendant had reasonble cause to believe that it was intended by said payments to give a preference to said defendants.

(10.)

I charge you that there is no evidence in the case that at the time of the making of the said alleged payments or any of them, said defendant had knowledge or notice that the effect of the enforcement of such payments would be to enable said defendant to obtain a greater percentage of its debts against the bankrupt, than other creditors of the same class, and your verdict must be for the defendant.

(11.)

I charge you that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that the defendant had notice or knowledge that the effect of the enforcement of such payments would be to enable said defendant to obtain a greater percentage of its debts against the said bankrupt than other of its creditors of the same class.

285 (12.)

I charge you that there is no evidence in the case that the St. Louis Chemical Company, bankrupt, in making said alleged payments made any transfer of its property with intent to hinder, delay or defraud its creditors.

(13.)

I charge you that if you find from the evidence in the case that the St. Louis Chemical Company, bankrupt, in making the alleged payments in plaintiff's declaration made the same in pursuance *to* a general plan on the part of said company to retire the bonds of said company held as collateral to the note of said defendant and to other creditors of said company, and that it was the purpose of said bankrupt in making said payments to release said bonds which were secured by a trust mortgage on the property of said bankrupt, and if you find that said bankrupt in pursuance of said purpose acted in the honest belief that said bonds so pledged as collateral security were valid and legal, then said alleged payments were not made with intent on the part of the said bankrupt to hinder, delay or defraud its creditors.

(14.)

I charge you that under the undisputed evidence in the case the alleged payments set forth in plaintiff's declaration were not transfers of property within the meaning of the bankruptcy law and your verdict must be for the defendant.

(15.)

I charge you that under the evidence in this case it conclusively appears that said alleged payments were not transfers of property within the meaning of the bankruptcy law, but on the contrary thereof, amounted to no more than the set-off of mutual debts and obligations between the bankrupt and the defendant, authorized by the
286 Bankruptcy act, and your verdict must be for the defendant.

(16.)

I charge you that it conclusively appears from the evidence in this case, that the note held by the defendant against the St. Louis Chemical Company, bankrupt, was fully extinguished and satisfied by setting off against the same by the voluntary act of the parties, the credit arising from the deposits of the said St. Louis Chemical Company in the bank of said defendant, said deposits being made in the usual course of business, and that such set-off and consequent extinguishment of said note was legal and valid, and was authorized by the bankruptcy law, and your verdict must be for the defendant.

(16½.)

I charge you that under the evidence in this case the deposits made by the St. Louis Chemical Company in the bank of said defendant were made in the usual course of business upon open account, subject to check, and under the law the bank had a legal right to apply the same in satisfaction of its note against said bankrupt

and the voluntary giving of the checks in question by the bankrupt to said defendant for the purpose of extinguishing and retiring said note was only the exercise of the right of set-off of mutual debts or obligations between the parties, as acknowledged by the bankruptcy law, and the same was not in any sense preferential payments or transfers, and your verdict must be for the defendant.

(17.)

I charge you that under the evidence in this case the deposits made by the St. Louis Chemical Company in the bank of said defendant, during the months of February and March, 1909, were made in the usual course of business, and were subject to be checked out by said St. Louis Chemical Company, and that upon the making of
287 the said deposits the said defendant became a debtor to said bankrupt to the amount thereof, and that the relation of debtor and creditor arose between said defendant and said bankrupt on account thereof, and said defendant had a legal right to apply the same in satisfaction of its $5,000 note held against said bankrupt and that the set-off of said mutual debts and obligations and the extinguishment of said note was authorized by the bankruptcy law, and your verdict must be for the defendant.

(18.)

I charge you that there is no evidence in the case that the defendant bank had notice of the plan which has been testified to of the directors to pay off the notes endorsed by the directors and secured by the treasury bonds and that your verdict should be for the defendant.

(19.)

I charge you that the burden of proof is upon the plaintiff in this case to prove by a fair preponderance of the evidence that at the time or times of the making of the alleged payments, the defendant had reasonable cause to believe that the property of the St. Louis Chemical Company was not sufficient at a fair valuation to pay its debts, and in this connection I charge you that knowledge of the fact—if it be a fact—that said company was unable to pay its debts as they fell due is not sufficient.

(20.)

I charge you that the defendant in this case cannot be charged with notice or knowledge of the bankrupt's insolvency or of its intent to prefer, because it incautiously neglected to make enquiries; but in such case where no actual knowledge is shown to have come to the defendant, and the defendant is sought to be charged only with notice of circumstances that should put a prudent man upon enquiry, then such circumstances must be of such a character as to
288 show that the defendant designedly abstained from making

enquiry, for the very purpose of avoiding knowledge, and its conduct in so abstaining must have been of such a character as to make its failure amount to bad faith.

(21.)

I charge you that if you find from the evidence that an arrangement or plan was entered into by the officers and directors of the St. Louis Chemical Company by which notes of said company *were* endorsed or guaranteed by the directors of said company were to be paid off before other claims were paid, that the knowledge thereof of Henry J. Tuger and David E. Harrison, directors of said company, cannot be imputed to defendant bank.

(22.)

I charge you that if you find from the evidence that the Chemical Company, during the months of January, February and March, 1909, deposited its money in the defendant bank in the ordinary and usual manner, in which men generally and usually deposit money in banks, and upon open account subject to their check, then the defendant bank had by law a lien on such money so deposited to secure the payment of any past due indebtedness due the defendant from the Chemical Company, and no subsequent act of the Chemical Company could deprive the defendant of such lien; and by virtue of such lien the defendant had the right to charge past due indebtedness up to the open account of the Chemical Company, and the Chemical Company had a right to recognize this lien, and voluntarily by checks on its account pay such past due indebtedness, to the defendant in this case, and such payments were not preferential, and the trustee in this case cannot recover and your verdict should be for the defendant.

289 (23.)

The defendant in this case cannot be charged with bad faith by showing that facts came to its notice that might create a suspicion of a fraudulent intent and purpose on the part of the Chemical Company; and the multiplying of mere suspicious circumstances does not make them amount to notice. You should examine each fact which the plaintiff claims came to the notice of the defendant and if it is not more than a suspicious circumstance you must discard it as an element of notice. The knowledge of the defendant to be sufficient to place it upon enquiry must be of a fact, as distinguished from mere suspicion that such fact existed.

(24.)

The law presumes honesty and fairness and fraud cannot be presumed but must be proven; and when any act or omission of the defendant is reasonably open to a construction consistent with honesty

and fair dealing, you cannot presume it to have been fraudulent, and unless the plaintiff has by a preponderance of the evidence proved such act or omission was fraudulent you must regard them as free from fraud.

C. W. GIDDINGS,
Attorney for Defendant.

GEORGE P. STONE AND
L. B. McARTHUR,
Of Counsel.

Charge of the Court.

GENTLEMEN OF THE JURY: The plaintiff here, Mr. Johnson, as trustee in Bankruptcy of the St. Louis Chemical Company, brings this suit against the Gratiot County State Bank, the defend-
290 ant, to recover certain moneys which Mr. Johnson, as trustee, claims he is entitled to recover for the benefit of the creditors of the St. Louis Chemical Company.

It is the claim of the plaintiff, as I understand it, and in stating his claim and the claim of the defendant and all the way through the charge, wherever I refer to the evidence, you must remember that you will take your own recollection of the evidence and not mine; as I recall it, it is the claim of the plaintiff here that the Chemical Company was in fact insolvent from at least January first, 1909, down to the time when the last payment in question was made here, and that was some time in March—March 31st, 1909. And the plaintiff claims that the Chemical Company was adjudged insolvent by the United States Court at Bay City, and that by that judgment it was determined that it had been so insolvent for four months prior thereto, prior to the filing of the petition. I will give you those dates in another part of the charge in a minute.

And the plaintiff claims that the Chemical Company while so insolvent entered upon a scheme to pay off certain notes given by or endorsed by its directors in preference to its other creditors of the same class, and that one of those notes amounting to $5,000 endorsed by Mr. Harrison, a director in the Chemical Company, and by one, Max Lowenstein, was held by the defendant bank, and that the bank received such payments with such knowledge of the fraudulent preference intended by the Chemical Company that under the law it must pay this money back to the trustee to be distributed by him equally among all the creditors entitled to prove claims against the Chemical Company.

The defendant claims that it received this money without any knowledge of any intent on the part of the Chemical Com-
291 pany to commit any fraud or make preferential payments, and if I remember correctly the bank claims it didn't have knowledge that the Chemical Company was in fact insolvent. And the bank claims that it had no knowledge or notice that a preference was intended in their behalf or any other creditors, and had no notice or knowledge of the scheme that the plaintiff claims was worked, and the bank claims it had a right to offset its note against

the money deposited by the Chemical Company in the bank, and therefore it had a right to receive the payments that it did receive and that it is not liable to pay them back.

Now the Court, gentlemen, has certain duties which it must perform, and you have certain duties to preform. It is the duty of the court to settle questions of law and to tell you what issues you are to determine. And it is your duty to pass upon the evidence in the case so far as a question of fact may be submitted to you, and you must confine yourselves strictly to your duties. You must not undertake to determine the law. The Court will determine the law for you. If I make a mistake in telling you what the law is, that will be corrected by a new trial or in a higher court because what I say is taken down by the stenographer, but if you should undertake to determine the law in your jury room and make a mistake, you see there would be no method of correcting your mistake; therefore you must take what the Court says as to the law as final and then apply that law to the facts as you may find them upon the issues submitted to you.

There are certain issues in this case that the court was obliged to receive testimony upon, and a large amount of documentary testimony of what took place in the United States Court was offered and received by the court, but now at the conclusion of the case I determine some of those questions for you, and you need not
292 consider any of the documentary evidence so far as it came from the United States Court except as I shall permit you to do so later on in this charge.

The court determines for you that the Chemical Company was in fact insolvent during the entire time from the first day of January, 1909, down until after the last payment to the bank involved here, and that you may start out with the proposition settled that all the moneys deposited in the bank from which these payments were made, were all so deposited and the payments made at a time when the Chemical Company was in fact insolvent.

In that connection I give you the plaintiff's first request to charge: "The St. Louis Chemical Company was insolvent within the meaning of the Bankruptcy Act during all the time from and including February 26th, 1909, to and including June 25th, 1909, that being the date upon which the petition in Bankruptcy was filed."

And the plaintiff's second request to charge: "In saying that the Chemical Company was insolvent, I mean that during that time the aggregate of its property would not, at a fair valuation, be sufficient in amount to pay its debts."

I also give you the plaintiff's third request to charge: "The St. Louis Chemical Company made or adopted a plan of disposing of some of its property and collecting in its quick or readily collectable assets and of using the moneys arising from these sources to pay off and discharge certain debts held by some of its directors or upon which some of its directors were liable, and I advise you that this scheme or plan was in violation of both the letter and the spirit

of the Bankruptcy Act and that in carrying it out, the Chemical Company acted in fraud of its creditors."

293 Gentlemen, you will notice that in the request which I read, the first request of plaintiff's counsel, I advised you that the Chemical Company was insolvent from February 26th, 1909, to and including June 25th, 1909. Previous to that I had advised you that they were insolvent from the first day of January, 1909, down through that period. The request which Mr. Lyon sent up was based upon the fact that the United States Court in Bay City, a Bankruptcy Court, had determined that question and the court holds that that is what we call in law res adjudicata; that is, it settles the question.

But in addition to that I also held and now tell you that under the undisputed evidence in this case you may start out with the proposition that the company was in fact insolvent from the first day of January on down through all that time.

I further instruct you as a matter of law that the payments upon this note were made by the Chemical Company with intent upon the part of the Chemical Company to create an unlawful preference under the Bankruptcy Law and to prefer defendant over other creditors of the same class, and you may treat that question as settled by the court for you.

So, gentlemen, you will see that two questions are determined for you by the court; the question that the Chemical Company was in fact insolvent during the time I mentioned, and the question that they did enter into an unlawful scheme which in law we call fraudulent under the Bankruptcy Law; that does not mean necessarily that any person is guilty of what the word fraud sometimes means to you, but it was fraudulent under the Bankruptcy Law. I determine that they did enter into such a scheme as that and I determine that the Chemical Company did put these moneys in the bank and paid them out with the fraudulent intent to prefer some
294 of its creditors. Those questions are settled for you by the court.

But in order to entitle the plaintiff to recover, he must not only show actual insolvency and intent to make preferential payments—the questions that I have just determined for you—but he must show by a preponderance of the evidence that the moneys were received by the defendant bank under such circumstances as charges the bank with bad faith, and in that connection I charge you as requested by defendant's counsel in his 9th request to charge: "I charge you that the burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that at the time of the making of each of said alleged payments, the defendant had knowledge or notice of the insolvency of said Bankrupt or that defendant had reasonable cause to believe that it was intended by said payments to give a preference to said defendant."

I hardly think the word 'fair' should be in there, Mr. Giddings, I think it should be, I charge you that plaintiff should establish by a preponderance of the evidence.

I also charge you as requested by defendant's counsel in his 11th

request to charge: "That the burden of proof is upon the plaintiff, to establish by a preponderance of the evidence that the defendant had notice or knowledge that the effect of the enforcement of such payments would be to enable said defendant to obtain a greater percentage of its debts against said Bankrupt than other of its creditors of the same class."

As bearing upon these questions, you may take into consideration whether the bank had reasonable cause to believe the property of the St. Louis Chemical Company was not sufficient at a fair valuation to pay its debts, and the fact, if it be a fact, that said Chemical Company was unable to pay its debts as they fell due; and
295 that the bank had notice of that fact is not of itself sufficient, but you may take these facts into consideration along with all the other facts and circumstances which are permitted to go to you in determining whether the bank acted in good faith or not.

In this connection I am requested by defendant's counsel to charge you: "The defendant in this case cannot be charged with bad faith by showing that facts came to its notice that might create a suspicion of a fraudulent intent and purpose on the part of the Chemical Company; and the multiplicity of mere suspicious circumstances does not make them amount to notice. You should examine each fact which the plaintiff claims came to the notice of the defendant and if it is not more than a suspicious circumstance, you must discard it as an element of notice. The knowledge of the defendant to be sufficient to place it upon inquiry must be of a fact as distinguished from mere suspicion that such fact existed."

Gentlemen, that is true as a statement of law, but I say to you in that connection that it is for you to determine what amount of circumstances amount to notice and you have a right to take into consideration all of the facts and circumstances appearing in the case under the instructions that I have already given and shall hereafter give to you in determining the question of whether the bank had notice or not.

I am also requested to charge you by defendant's counsel in his 24th request: "The law presumes honesty and fairness, and fraud cannot be presumed, but must be proven; and when any act or omission of the defendant is reasonably open to a construction consistent with honesty and fair dealing, you cannot presume it to have been fraudulent and unless the plaintiff has by a preponderance of the evidence proved such act or omission was fraudulent you
296 must regard them as free from fraud."

That is true as an abstract statement of law, but I say to you in that connection that you have a right to determine that fraud has been proven by circumstances as well as by actual evidence in the case. I mean by somebody saying so or stating some fact from which you determine it.

In other words, you take into consideration all of the evidence here and all of the circumstances in the case and then determine whether or not the bank had such notice as I have described to you.

In that connection I charge you as requested by defendant in their 20th request: "I charge you that the defendant in this case

cannot be charged with knowledge or notice of bankrupt's insolvency or of its intent to prefer because it incautiously neglected to make inquiries but in such case where no actual knowledge is shown to have come to the defendant and the defendant is sought to be charged only with notice of circumstances that should put a prudent man upon inquiry, then such circumstances must be of such a character as to show that the defendant designedly abstained from making inquiry for the very purpose of avoiding knowledge and its conduct in so abstaining must have been of such a character as to make its failure amount to bad faith."

So you will see, gentlemen, the only question left for you to determine in this case is, was the bank chargeable under the rules I have laid down with notice of the fraudulent intent of the Chemical Company to deposit this money in the bank and make these preferential payments at the time that the money was so deposited in the bank and upon which the checks were afterwards drawn.

Now when the money was placed in the bank, the bank
297 would owe the money to the Chemical Company. The Chemical Company owed a note to the bank. If the bank received this money in good faith and without knowledge, such knowledge as I have defined to you in my charge here, of the fraudulent intent upon the part of the Chemical Company, then it would have the right to offset its note against the money so deposited, and if the payments were received by the checks for the purpose of making payments upon the note, the bank under those circumstances could keep the money. But if it had notice or knowledge or if in the exercise of bad faith it abstained from learning those things when it might, by the exercise of reasonable diligence, and would have learned the fact that the money was placed there in pursuance of that plan of the Chemical Company to pay off certain of its directors and those who were endorsers upon its paper, then the bank could not keep the money and could not offset it against this note and would have to pay it back to the Trustee and receive its distributive share along with the other creditors when it proved up its claim.

That is the only question for you to determine in the case. In determining that question you have a right to take into consideration all of the evidence that has been offered and introduced in the case and allowed to go to you for that purpose.

In order that you may make no mistake about that, I will say to you that the statement made by the Chemical Company in the Bankruptcy Proceedings, those documents that were read to you from the Bay City Court, the schedules and such things as that that did not come to the knowledge of the bank, would not be any evidence upon that question. That evidence was put in for the court to determine the other questions from.

I also instruct you that inasmuch as Mr. Tuger was in-
298 terested for himself in what took place in the Chemical Company's meetings, that notice to Mr. Tuger cannot be imputed or charged up to the bank, although Tuger was at that time an officer of the bank, because it is a rule of law that you cannot

charge to an agent of the bank, notice to the bank where that agent is interested personally for himself in the transaction that is going on, adversely to the bank. So in determining whether this bank had this notice or knowledge that we have been talking about here, with the exception of what I have stated to you that you must exclude, you take into consideration all the notice and knowledge that the other executive officers of the bank did have, including the knowledge of its President, Mr. Darragh, if you find that he did have any. It has already been said in evidence that he was away much of the time and didn't know much about this matter, but if there is any proof of his having any knowledge about it, you may consider that, but particularly the knowledge that the cashier and the assistant cashier of that bank had as to what was being done with the property of the Chemical Company and what was being done with its debts and all of those things and all of the circumstances that have been shown came to the knowledge of the Cashier and Assistant Cashier of that bank in handling these transactions and the collections and any knowledge that came to them by reason of having some interest in the Chemical Company, if you find that such knowledge did come, you have a right to consider all those things and then determine whether this bank had notice or knowledge of the fraud upon the part of the Chemical Company in depositing this money for the purpose of making these preferential payments, remembering all the time that the court has determined the other questions
299 for you as a matter of fact that the money was deposited there with intent on the part of the Chemical Company to defraud.

Mr. Lyon: I would like to add a request that that does not mean by the language used to the jury but what the jury may take the information which Henry J. Tuger had, provided they find it went from him to the Cashier of the bank.

The Court: I instruct you, gentlemen of the jury, that in stating that you could not charge the bank with Tuger's knowledge, I was simply stating to you a proposition of law. I do not mean to say that you cannot consider anything, if there is any evidence of anything, that the Cashier and Assistant Cashier learned from Mr. Tuger or would have learned from Mr. Tuger had they exercised reasonable diligence under the rules that I have laid down here, in pursuing inquiry, but you must remember that you take that under the instructions I have already laid down that they cannot be charged with fraud for not pursuing inquiry unless they acted in bad faith; but if there is any evidence that it came to the knowledge of the bank, such knowledge as Mr. Tuger actually did have, you would have the right to consider that, but you cannot charge the bank with knowledge simply because Mr. Tuger had it and because he happened to be an officer of the bank.

Mr. Stone: There is no evidence tending to show that Tuger told the officers of the bank anything about it.

The Court: There is no direct evidence in the case tending to show that. The jury have a right to consider all of the circumstances and surroundings and everything that is in the case and

the various meetings that took place in the bank by its board of directors and determine whether or not the officers of the bank had notice under the rules I have laid down.

300 Mr. Lyon: Would your honor state as to the amount to the jury.

The Court: It is the claim of the plaintiff that the amounts paid, and received by the bank including interest at five per cent up to this date is $4,682.53. Now, if there is any dispute about that, I will receive the claim of the plaintiff or I will permit the jury to add up and cast the interest themselves.

Mr. Stone: I think Mr. Lyon is probably right.

Mr. Lyon: I figured the amount of payments from February 26th, including that payment, to and including the payment of March 31st, from the date of commencement of suit, August 2d, 1912; it does not include compound interest.

The Court: Can't you agree that that is the amount unless you afterwards compute it and find it is wrong.

Mr. Stone: Yes.

The Court: $4,682.53 is the amount including the interest up to today. That means the interest is added in there that the plaintiff claims. Now, gentlemen of the jury, I think I ought to instruct you in that connection that it does not follow that because you may find for the plaintiff, if you do, that that shall be the entire amount or the exact amount of your verdict, because if you find that any of these amounts were put in the bank at a time when the bank was acting in good faith, if you find such a state of facts as that existed, and then find there came a time when the bank was not acting in good faith and that the other amounts were not received in such a way, then you will readily see that the amounts that were received in good faith would not be charged up to the bank and you would have to make your own computation. If you reach such a time as that and desire any more figures, you

301 may come in and ask for the figures and the dates and all those things, if you desire it at any time.

I didn't say to you what I usually say to every jury, that when I use the expression that the plaintiff must produce a preponderance of the evidence upon any proposition, that that means that the evidence that he produces on that side outweighs that upon the other side; not necessarily that he has the most witnesses but that the evidence of the plaintiff is stronger in your judgment in weight than that of the defendant opposed to it. If the evidence is evenly balanced, then the plaintiff has not shown that fact by a preponderance of the evidence. If it balances stronger in favor of the defendant, then he has not shown it. But in order to satisfy the burden of proof he must show that fact by evidence that outweighs that opposed to it. That does not mean necessarily that he must bring individuals to swear to it on the stand; he may show it by documentary evidence or any evidence that has been allowed to go to you. You take it all together, and determine whether he has shown this fact, the one fact that I submit to you, the question of whether the bank had knowledge, by a preponderance of the evidence.

If you find that one point in favor of the plaintiff, then you know what the amount of damages *are* unless you take up the other question of the division of the money, and you will bring your verdict in accordingly, we find for the plaintiff so many dollars. If you find in favor of the defendant upon that, then you bring a verdict of no cause of action.

Mr. Lyon: Would there be any objection to the jurors taking into the jury room the checks so that if they want to figure from them, they may have the checks making payment to this bank from February 26th to and including March 31st?

302 Mr. McArthur: Yes, I object to that.

The Court: I won't exercise my discretion now unless they ask for it.

Swear an officer.

(Jury retire.)

Mr. Stone: The defendant takes an exception to the charge as given and to the refusal of the court to give its requests to charge which were not given by the court.

(Afternoon's Proceedings of February 28th, 1914.)

(Jury return into Court.)

Juror: The figures here, there is some that don't understand, $4,682.53, and they wanted you to instruct them on that a little plainer.

The Court: In regard to what that is; they want to know what those figures mean?

Juror: Yes and how they should determine.

The Court: Those figures that your foreman just read are the total amount of the moneys paid to the bank by the Chemical Company together with interest upon it at five per cent up to this date. That would be the amount of your verdict if you find for the full amount under the instructions I have given you, in favor of the plaintiff. If there is any question about it I will answer.

A Juror: If the jury were to find for the plaintiff, could they find for any other amount than that?

The Court: Yes.

A Juror: If one payment was irregular or unlawful, how could one payment be unlawful and not all of them be unlawful?

The Court: You could not find a greater amount for the plaintiff than that. You might find a lesser amount providing you find under the evidence that some of the payments were received

303 in good faith and there came a time afterwards when some of them were received in bad faith. As to whether there is any place to divide that or not, that is for you to say. I don't say that there is or is not. That is a matter of fact for you, but if you find such a state of facts, then you have a right to leave out such payments from your verdict as you find were received in good faith. Do you understand that? Under the instructions I gave you above, and if you come to that point, it might be necessary for you to get the figures as to the different payments unless you have them in

your minds. If you want any of those figures we will furnish them to you. If there is any one of you, without consulting the rest, that thinks you want those figures or think- that the jury ought to have them, you may suggest it and they will be furnished to you while you are here or you may go out and ask for them afterwards.

A Juror: I suggest that we have them.

The Court: Any objection to their having the checks?

Mr. Lyon: No, we want to have them to have the checks. (Producing checks.) There *is* 12 checks, those are all the payments we are seeking to recover.

The Court: That makes up the amount I gave you, except the interest.

Mr. Lyon: Yes, sir.

The Court: You are allowed to take these 12 checks; it is agreed between the attorneys that those checks represent the payments making up the amount I gave you, excepting the interest. The interest is added in the total amount, and the attorneys agree also that the stamp on here represents the date when it was paid.

Mr. Lyon: Oh, yes.

The Court: In order to make that clear to you, if you should come to any point of dividing these payments, I will say to you that if you come to a point at any time where you find that
304 a payment was taken in bad faith, all of the other payments after that would also come under the same rule, because if they once had notice that made it bad faith, then all payments after that would be under that. Is there any other subject than that that anybody wanted to inquire about.

A Juror: No.

(Jury retire.)

Verdict.

(Jury return into court and render a verdict of $4,682.53 for the plaintiff as claimed.)

Mr. Stone: We want to ask for the usual stay of proceedings for 60 days in order to remove the case to the Supreme Court.

The Court: You may have that.

Judgment.

And afterwards and on the 28th day of February, 1914, a judgment was duly rendered in accordance with the verdict of the jury in favor of the plaintiff and against the defendant for the sum of $4,682.53, together with the plaintiff's costs to be taxed.

Petition in Bankruptcy.

To the Honorable Henry H. Swann, Judge of the District Court of the United States for the Eastern District of Michigan, Northern Division:

The petition of the United States Coal Company, a corporation, doing business with its home office at Cleveland, Ohio, Pere
305 Marquette Railroad Company, a corporation of Detroit, Michigan, and Jess Thrush of the City of St. Louis, Michigan, respectfully show:

That the St. Louis Chemical Company is a corporation organized and existing under the laws of the State of Michigan for manufacturing purposes; that its principal office (as designated in its articles of incorporation) is the City of St. Louis, in the County of Gratiot and State of Michigan, and that it, the said St. Louis Chemical Company, has for a period of over one year next preceding the date of filing this petition had its principal place of business within the City of St. Louis, in the County of Gratiot, and State of Michigan and the district aforesaid. And that the said St. Louis Chemical Company owes debts to the amount of one thousand dollars ($1,000) and over, to wit: in the sum of eighty thousand dollars ($80,000) and over.

That your petitioners are creditors of the St. Louis Chemical Company, said corporation, having provable claims amounting in the aggregate, in excess of the security held by them, in the sum of five hundred dollars ($500) and over; that the nature and amount of your petitioners' claims are as follows:

The United States Coal Company: Claim represented by open account in the sum of three hundred ninety-five and 34/100 dollars ($395.34); by note dated October 5, 1908, due in ninety days after date, in the sum of four hundred twenty and 87/100 dollars ($420.87) and interest thereon; that the consideration for said note and open account so owing is the price and value of coal delivered by the said The United States Coal Company to the St. Louis Chemical Company from time to time prior to the 31st day of December, 1908; total amount of its claim eight hundred sixteen and 12/100 dollars ($816.12) with interest to be added.

306 Pere Marquette Railroad Company: Claim in the amount of two thousand three hundred twelve and 6/100 dollars ($2,312.06) and interest thereon; that the consideration for said debt so owing it is for freight charges and advance freight charges in the transportation of merchandise of various kinds delivered to the St. Louis Chemical Company and received from it for delivery by said Railroad Company to the respective consignees thereof.

Jess Thrush: Claim in the sum of twenty-five dollars ($25.00) in amount assigned to the said Jess Thrush from one William N. Barstow of St. Louis, Michigan. That said claim is for unpaid insurance premium on policies written upon the property of the said alleged bankrupt.

That the St. Louis Chemical Company is principally engaged in

manufacturing certain chemicals, such as sulphuric and muriatic acids and various kinds of salts produced from the condensation of certain brine taken from its wells in the City of St. Louis and that the whole of said business in the manufacture of said product and in the sale thereof and the consignment and delivery of said product to the consumers thereof, is conducted from and in the City of St. Louis in said county and state and in said district and that its business office and legal domicile and residence is in said city and has been continuously therein for over two years last past.

And your petitioners further represent that the said St. Louis Chemical Company, said corporation, is insolvent and that within four months next preceding the date of this petition the said St. Louis Chemical Company committed an act of bankruptcy, in this that it has heretofore, to wit: at times and in the manner hereinafter set forth, transferred while insolvent, a portion of its
307 property to one or more of its creditors with the intent to prefer such creditors over its other creditors and in manner as follows:

That heretofore on the 25th day of September, 1908, it owed the Gratiot County State Bank, a corporation of the City of St. Louis, one promissory note of said date for five thousand dollars ($5,000) and that thereafter it made payments thereon in manner as follows: February 26, 1909, Seven Hundred Dollars ($700,00); March 4, 1909, Two Hundred Dollars ($200,00); March 6, 1909, Two Hundred Dollars ($200,00); March 12, 1909, Seven Hundred Dollars ($700,00); March 13, 1909, Five Hundred Dollars ($500,00); March 15, 1909, Four Hundred Dollars ($400,00); March 20, 1909, Two Hundred Dollars ($200,00); March 23, 1909, Nine Hundred Dollars ($900,00); March 24, 1909, One Hundred Dollars ($100,00); March 31, 1909, Four Hundred Dollars ($400,00); total payments upon said note within said four months of Forty-three Hundred Dollars ($4,300,00), all of which payments were made with the full knowledge on the part of the Gratiot County State Bank; that said payments were intended as such a preference on the part of the said alleged bankrupt and with knowledge on its part that said the St. Louis Chemical Company, was insolvent.

That heretofore to-wit: Under date of November 13, 1908, the said St. Louis Chemical Company, owed the State Bank of Stanton, Michigan, one certain promissory note of said date in the sum of Three Thousand Five Hundred Dollars ($3,500,00) that with like intent and while insolvent the said St. Louis Chemical Company made payments upon such note in manner as follows: March 13, 1909, Five Hundred Dollars ($500,00); March 15, 1909, Six Hundred Dollars ($600,00); March 20, 1909, Three Hundred Dollars ($300,00); March 24, 1909, One Thousand Two Hundred
308 fifty-five and 63/100 Dollars ($1,255,63); April 10, 1909, Two Hundred Fifty Dollars ($250,00); April 27, 1909, Three Hundred Dollars ($300,00); May 1, 1909, Two Hundred Ninety-four and 37/100 Dollars ($294,37); making a total payment thereon of Three Thousand Five Hundred Dollars ($3,500,00), all of which payments so made within said four months were made

by the said St. Louis Chemical Company and received by said State Bank of Stanton with full knowledge on its part that such preference was intended by said alleged bankrupt and that said St. Louis Chemical Company was insolvent.

That on to-wit: June 18, 1907, said alleged bankrupt owed the Commercial Savings Bank of St. Louis, Michigan, one certain promissory note of said date payable on demand in the sum of Two Thousand Five Hundred Dollars ($2,500.00). That the said alleged bankrupt with like intent and while insolvent made payments upon said promissory note in manner as follows: March 8, 1909, Three Hundred Dollars ($300.00); March 12, 1909, Four Hundred Dollars ($400.00); March 13, 1909, Two Hundred Dollars ($200.00); March 15, 1909, Four Hundred Dollars ($400.00); total payments thereon of One Thousand Three Hundred Dollars ($1,300.00) within the said period of four months; all of which payments were received by the said Commercial Savings Bank of St. Louis with full knowledge on its part of such intent upon the part of the St. Louis Chemical Company and that it was insolvent.

That heretofore to-wit: September 28, 1908, the said St. Louis Chemical Company owed one Henry J. Tuger of the City of St. Louis, Michigan, upon promissory note of said date Two Thousand Five Hundred Dollars ($2,500.00). That with like intent and while insolvent, the said St. Louis Chemical Company made the following payments upon said note: February 26, 1909, Two Hun-
309 dred Dollars ($200.00); March 5, 1909, One Hundred Dollars ($100.00); March 8, 1909, Two Hundred Dollars ($200.00); March 12, 1909, Two Hundred Dollars ($200.00); March 13, 1909, Three Hundred Dollars ($300.00); March 15, 1909, Three Hundred Dollars ($300.00); total payments thereon One Thousand Three Hundred Dollars ($1,300.00), all of which amounts were paid upon the said note to the said Henry J. Tuger, with full knowledge on his part that the said St. Louis Chemical Company intended such preference and that it was insolvent.

That heretofore to-wit: On November 6, 1908, the said St. Louis Chemical Company owed Long & Phillips, copartners of the said city of St. Louis, upon promissory note of said date Five Hundred Dollars ($500.00); that afterwards and under date of February 26, 1909, it paid thereon with like intent and while insolvent, to the said firm of Long & Phillips, the sum of One Hundred Ninety Dollars ($190.00), which amount was received by the said firm of Long & Phillips with full knowledge on their part that such preference was intended by the said St. Louis Chemical Company and that it was insolvent.

That under date of November 16, 1908, the said St. Louis Chemical Company owed to the said The Old National Bank of Grand Rapids, Michigan, one promissory note of said date in the amount of Two Thousand Dollars ($2,000.00). That under date of February 26, 1909, with like intent and while insolvent, it paid the said The Old National Bank of Grand Rapids thereon, the sum of One Thousand Dollars ($1,000.00) and under date of March 12, 1909, it paid upon said note the sum of Four Hundred Eighty Dollars

($480.00), all of which payments were made with full knowledge on the part of the Old National Bank of Grand Rapids that the said St. Louis Chemical Co. intended such preference and that it was insolvent.

310 That some time prior hereto and on or about (date unknown) May 1, 1909, the said St. Louis Chemical Company owed one William Hugh, upon promissory note, a specified sum of money in excess of One Thousand Dollars ($1,000.00); that on May 1, 1909, with like intent and while insolvent, the said St. Louis Chemical Company paid to the said William Hugh upon the said promissory note Five Hundred Dollars ($500.00); under date of May 11, 1909, it paid the said William Hugh Four Hundred Dollars ($400.00); under date of May 1, 1909, it paid the said William Hugh thereon Fifty Dollars ($50.00). Total payments thereon, Nine Hundred Fifty Dollars ($950.00), all of which payments were so made with full knowledge on the part of the said William Hugh that the said St. Louis Chemical Company intended such preference and that it was insolvent.

That under date of January 21, 1909, the said St. Louis Chemical Company owed the St. Louis Hardware Company of St. Louis, Michigan, upon promissory note, Nine Hundred Eighty-six and 55/100 Dollars ($986.55). That under date of May 4, 1909, the said St. Louis Chemical Company with like intent and while insolvent, paid to the said St. Louis Hardware Company thereon One Hundred Eighty and 75/100 Dollars ($180.75); that such payment was made with full knowledge on the part of the St. Louis Hardware Company that it was intended as a preference on the part of the St. Louis Chemical Company, and that it was insolvent.

Wherefore your petitioners pray, that service of this petition with a subpœna may be made upon the St. Louis Chemical Company as provided in the Acts of Congress relating to Bankruptcy; and

311 that it may be adjudged by the Court to be a bankrupt within the purview of said acts.

THE UNITED STATES COAL COMPANY,
By WILLIAM A. BAHLKE, *Attorney.*
PERE MARQUETTE RAILROAD COMPANY,
By WILLIAM A. BAHLKE, *Attorney.*
JESS THRUSH.

WILLIAM A. BAHLKE,
Attorney for Petitioners.

T. W. WHITNEY,
Of Counsel.

Affidavit of William A. Bahlke in Support of Petition in Bankruptcy.

UNITED STATES OF AMERICA,
Eastern District of Michigan, Northern Division:

William A. Bahlke, being duly sworn, deposes and says, that he resides in the City of Alma, Michigan, and is the Attorney for said petitioning creditors and authorized and admitted to practice in the District Court of the United States for the Eastern District of Michigan. That he is the Attorney and Agent of said petitioners in all matters recited in and relating to the said petition and that he makes the same for and in their behalf and at their request; that he prepared and has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true to his own personal knowledge. That his sources of information among other things is obtained from an examination of the books and records of the St. Louis Chemical Company, now in possession of its Secretary at St. Louis, Michigan; statements made to him by the officers regarding said matters so set forth, from an examination of the
312 records of accounts and notes against said St. Louis Chemical Company in possession of said petitioning creditors and admissions thereof by said Company by its officers in regard thereto.

That the reason this verification is not made by all of the petitioners through their proper officers is that two of said petitioners are corporations whose officers respectively reside outside of Michigan or are not within said State and that it would require one week at least to secure their signatures hereto; that during which time a substantial part of the preferences alleged in said petition as having occurred or having been made by said alleged bankrupt within four months from this date will thereby have ceased to be preferences within the meaning of the bankruptcy act under which said petition is filed. That he has been duly authorized to make this verification by said petitioners.

WILLIAM A. BAHLKE,
Attorney for Petitioners.

Subscribed and sworn to before me this 25th day of June, A. D. 1909.

HILDA M. DOWNING,
Notary Public in and for Gratiot County.

My commission expires March 10, 1913.

Affidavit of Jess Thrush in Support of Petition in Bankruptcy.

UNITED STATES OF AMERICA,
Eastern District of Michigan, Northern Division:

Jess Thrush, being duly sworn, deposes and says that he resides at St. Louis, Michigan, and is one of the aforesaid petitioning creditors and who signed said petition. That he has heard read the

313 foregoing petition and knows the contents thereof and that the facts therein stated are true.

JESS THRUSH.

Subscribed and sworn to before me this 25th day of June, A. D. 1909.

HILDA M. DOWNING,
Notary Public in and for Gratiot County, Michigan.

My commission expires March 10, 1913.

Filed June 25th, 1909, in Clerk's Office.
(Signed) CARRIE DAVIDSON, *Clerk.*

Answer of St. Louis Chemical Company to Petition in Bankruptcy.

In the District Court of the United States of America for the Eastern District of Michigan, Northern Division.

In Bankruptcy. No. 421.

In the Matter of THE ST. LOUIS CHEMICAL COMPANY, a Corporation, an Alleged Bankrupt.

The Answer of the St. Louis Chemical Co., a Corporation, Hereinafter Designated as Respondent, to the Petition Filed in said Cause Praying that This Respondent be Adjudicated a Bankrupt.

This Respondent for answer to said Petition and all of the allegations therein contained, respectfully shows unto the Court:

I.

That it is now, and has for several years last past, been engaged in the manufacture and sale of certain chemicals, acids, etc.,
314 and that its principal place of business during said time, and still is, located at the City of St. Louis, Gratiot County, Michigan.

II.

That the assets of this Respondent consists of real estate and the appurtenances thereunto belonging located within the corporate limits of the City of St. Louis, together with certain personal property, consisting of tank cars, carboys, furniture and furnishings, tools and equipment necessary for use in the business of manufacturing, shipping and selling of chemicals, acids, etc.

III.

That this Respondent has, up to within a short period, enjoyed a good business and had been able to manufacture and sell its products at a fair profit.

IV.

This Respondent by way of explanation of the several alleged acts of bankrupt in said petition charged, shows unto the Court:

(*a*) That prior to the 15th day of May, 1907, this Respondent was engaged in the business described in said petition and here above described, and at the place above described under the style and corporate name of the St. Louis Chemical Co., having been duly incorporated under and by virtue of the laws of the State of New Jersey.

(*b*) That at the time of the incorporation in the State of New Jersey, under and by virtue of its laws, certain bonds were duly issued in the sum of One Hundred Thousand Dollars and that $56,000 of said bonds were duly sold to divers persons, firms and corporations, and that there remains in the hands of the Board of Directors, as treasury bonds, the sum of $44,000 in bonds, which were retained as such treasury bonds and in the charge, custody
315 and control of said Board of Directors until the organization and incorporation of this Respondent.

(*c*) That on the 16th day of May, 1905, while said St. Louis Chemical Co. was in existence, under and by virtue of the laws of the State of New Jersey, and pursuant to the action of the stockholders and board of directors of said corporation, the Security Savings Bank and Trust Co., a corporation of the State of Ohio and doing business at the City of Toledo, Ohio, was duly appointed trustee of said bonds and a deed of trust was duly issued by the officers of the St. Louis Chemical Co. to said trustee, which said trust deed was, in due time, duly recorded in the office of the Register of Deeds for the County of Gratiot and a copy thereof filed in the office of the clerk of the City of St. Louis, where the same has remained ever since and for the purpose of continuing its full force, power and effect, has been renewed annually by affidavit of renewal.

(*d*) That in and by said trust deed, said trustee acquired, in its official capacity, the title and interest in and to all of the property of the St. Louis Chemical Co., both real and personal of every name, nature and description whatsoever.

(*e*) That it was covenanted and agreed in said trust deed, that said St. Louis Chemical Co. should pay and discharge all of the outstanding bonds and should pay interest thereon until the same were duly retired, according to the terms and conditions set forth in said trust deed.

(*f*) On the 15th day of May, 1907, this Respondent for the purpose of reorganizing and reincorporating the St. Louis Chemical Co. under and by virtue of the laws of the State of Michigan, did execute, according to law, its certain articles of association and subsequently filed the same with the Secretary of the State of Michigan and
316 pay the franchise fee thereon; the same being incorporated in the sum of Three Hundred Thousand Dollars, and retaining the corporate name of the St. Louis Chemical Co.

(*g*) That at the time of such reincorporation, the old corporation was involved and obligated to divers persons, firms and corporations in large sums of money, which were assumed by this Respondent and

duly paid by it by sale of manufactured products and assessments made on stock. That it became and was necessary to raise money for working capital, and in consideration thereof, the Board of Directors of this Respondent, at a meeting called for such purpose, authorized and empowered its officers to make loans where the same could be obtained, and as security for the payment thereof, to issue certain treasury bonds, then in the hands of the treasurer, and pursuant to such instructions and authority, the officers of this Respondent did hire money of certain persons, firms and corporations, including banks, and issued as security for the payment of same, the entire amount of $44,000 of treasury bonds, which money so borrowed was used as working capital.

V.

This Respondent here shows unto the Court, that loans were made pursuant to such authority from the following names, persons, firms and corporations, viz:

The Old National Bank, Grand Rapids, Mich., the sum of $10,000; Gratiot County State Bank, the sum of $5,000; The State Savings Bank, Stanton, Mich., the sum of $4,500; The Commercial Savings Bank, St. Louis, Mich., the sum of $2,500; Henry J. Tuger, St. Louis, Mich., the sum of $2,500; Wm. Hugh, Morley, Mich., the sum of $2,500; Mrs. F. N. Wright, Greenville, Mich., the sum of $5,000; State Bank, Edmore, Mich., the sum of $1,000.

That all of said loans above described were secured by
317 the issuance and delivery of treasury bonds, aggregating the sum of $44,000.

VI.

This Respondent further shows unto the Court, that all of the loans above described were not made at the same time, but were made at different times as the financial condition of this Respondent demanded, and that when said loans were made treasury bonds were duly issued and pledged as security for the payment thereon.

VII.

That some of said loans were made for the purpose of paying former loans, in which event, the treasury bonds so pledged as security were reclaimed and the same reissued and repledged as loans were obtained.

VIII.

This Respondent further shows unto the Court, that while said bonds were outstanding and in the hands of persons, firms or corporations, from whom loans had been made, they were and remained a just obligation against this Respondent, but were beyond its control and in case of failure to pay the notes or obligations at maturity, then the owner of said notes, or obligations, were duly

authorized and empowered to sell and dispose of said bonds for the best price obtainable, and that it became and was necessary for the safety and protection of this Respondent, to pay and discharge all of said secured obligations and reclaim and retire said bonds as fast as possible.

IX.

This respondent further shows unto the Court, that at the time of making the payments to the several persons, firms, corporations and individuals, set forth and described in the petition filed in said cause, they were made for the purpose of saving to this Respondent, its stockholders and creditors, the bonds so held,
318 and that said payments were not made for the purpose of giving preference or advantage to the persons receiving said payments, but as an act of business necessity in which the creditors, as well as the stockholders of this Respondent, were benefited.

That the said persons, firms and corporations receiving said payments were in a class peculiar unto themselves and possessed the same kind and character of securities and held the same kind and character of obligations, and that there was no discrimination whatever among the members of said class, save and excepting certain directors of this respondent who also held securities.

X.

This respondent further shows unto the Court, that it carried insurance with three different insurance agencies, viz: Long & Phillips, Aldrich & May, W. N. Barstow & Co., all of the City of St. Louis, Mich., and that at the time of making payments to the firm of Long & Phillips, described in the petition filed in said cause, payments were likewise made to Aldrich & May and W. N. Barstow & Co., each being paid pro-rata according to the amount of insurance issued.

This Respondent had given notes to the agents for the premium amount in each of said policies with the agreement and understanding that in case of failure to pay the notes, or obligations at maturity, then the agents for said insurance company reserved the right to cancel the policy at any time. That the payments, so made, *was* made for the express purpose of saving and preventing the cancellation of said policies and to retain sufficient security from loss or damage by fire, should it occur.

XI.

This Respondent further shows unto the Court, that the mortgage bond, or trust deed, covered all of the property of this Re-
319 spondent of every name, nature or description whatsoever, and it was claimed, that when property was sold under the terms of said mortgage, the proceeds of such sale were also held as security.

That all the payments made by this Respondent within four months prior to the time of filing said petition, *was* made from sale of property covered by said mortgage bond, or trust deed.

XII.

This Respondent expressly shows unto the Court, that in making the several payments, hereinbefore described in the petition filed in said cause, the same *was* not made with intent to hinder or defraud its creditors, nor in any way or manner as a preference, but *was* made for the purpose of strengthening the financial credit and responsibility of this Respondent, and for the purpose of saving the security pledged and which would be forfeited in case payments were not made.

XIII.

This Respondent further shows, that before making said payments, its officers advised with its said creditors setting forth its financial condition, including the fact that said treasury bonds had been pledged and held as security for the payment of money obtained by this respondent, and that it was the purpose and intent of this Respondent to pay said secured obligations and reclaim and retire said bonds, and the officers of the Pere Marquette Railroad and of the United States Coal Co. were visited by the secretary and general manager of this Respondent at their several offices and informed as to the intent and purpose of this Respondent, as above set forth, and were advised by the officers so visited, that the plan was a feasible plan and the only method of saving the securities so pledged.

That the officers of the Pere Marquette Railroad stated that it would be no more than right when said obligations were
320 paid and the bonds reclaimed, that the then unsecured creditors should be subrogated to the rights of the securities so reclaimed.

XIV.

This Respondent further shows unto the Court, that in making said several payments, the same *was* made with the full knowledge of the unsecured creditors and with the approval of a large majority of them and *was* in no way or manner, deceptive or misleading.

That at no time have the persons named in the petition filed in said cause, protested — this Respondent, or to its officers against the carrying out of said plan and have made no objection whatever to said payments being made and have not demanded settlement of their several claims of this Respondent, and that the first knowledge and notice that this Respondent had that any of its creditors were dissatisfied was upon service of subpœna issued in said cause.

That it has been the purpose, intent, wish and desire of this Re-

spondent to pay and discharge all of its obligations in full including its unsecured obligations.

XV.

That this Respondent also reported to the Commercial Agency of Dun and Bradstreet a detailed outline of its affairs; the same as had been outlined to its several creditors in which it was proposed on the part of this respondent to pay and discharge the obligations secured by said treasury bonds first, and as soon as said bonds were reclaimed and retired then to proceed at once to marshal all of its assets and pay and discharge its remaining creditors from the balance of its property.

XVI.

This Respondent here denies that it has committed any act or acts of bankruptcy, and has not in any way or manner deceived or
321 misled any of its creditors, and has not intentionally preferred any creditor, but that all have been treated alike.

XVII.

This Respondent in consideration of the premises, prays judgment of dismissal of the petition filed in said cause with costs to this Respondent.

XVIII.

This Respondent further shows unto the Court, that the petition filed in said cause does not set forth such a state of facts as are necessary to be set forth and established under the bankruptcy laws, in that it does not allege anything concerning the assets or the value of the assets held by this Respondent, and does not allege that this Respondent has not sufficient assets at a fair valuation to pay and discharge its obligations in full, and that the only allegation that would imply bankruptcy is the declaration that this Respondent is insolvent. And that said petition is indefinite, uncertain, insufficient and misleading and not a proper basis to authorize adjudication in bankruptcy.

ST. LOUIS CHEMICAL COMPANY,
By GEORGE S. ALDRICH, *Secretary.*

L. C. PALMER,
Attorney for Alleged Bankrupt.

Business Address, Stanton, Mich.

STATE OF MICHIGAN,
County of Gratiot, ss:

On this 14th day of July, 1909, personally came before me, the undersigned, a Notary Public in and for said county, George S.

Aldrich, who being duly sworn deposes and says: That he is the Secretary of the St. Louis Chemical Co., and makes this affidavit for and in its behalf, being authorized so to do. That he has read
322 foregoing answer by him subscribed and knows the contents thereof, and that the same is true.

GEORGE S. ALDRICH.

OTTO F. MEY,
Notary Public.

My commission expires Jan. 28, 1913.

Report and Opinion of Lee E. Joslyn, Special Master, in Re Adjudication.

The District Court of the United States for the Eastern District of Michigan, Northern Division.

In Bankruptcy. No. 421.

In the Matter of THE ST. LOUIS CHEMICAL CO., a Corporation, Bankrupt.

To the Honorable Henry H. Swan, Judge of said Court:

I, Lee E. Joslyn, Special Master, to whom the above matter was referred by an order made and entered on the 9th day of November, A. D. 1909, by which said order I was directed to take the testimony of the parties and report the same to the Court, with my opinion thereon, do hereby respectfully report as follows:

On June 25, 1909, an involuntary petition was filed by the Pere Marquette Railroad Company, the United States Coal Company, and Jess Thrush, the claim of Thrush, being a claim assigned to him by one William N. Barstow.

The petition alleges the insolvency of the alleged bankrupt for more than four months prior to the filing of the same, and also alleges the payment of preferences within four months of the
323 filing of the petition to various parties; these parties so receiving alleged preferences being the following:

State Bank of Stanton	$3,500.00
Commercial Savings Bank of St. Louis	1,300.00
Henry J. Tuger	1,300.00
Old National Bank of Grand Rapids	480.00
William Hugh	950.00
St. Louis Hardware Co.	180.75
Long & Phillips	190.00

The answer denies any acts of bankruptcy, alleging that under a certain trust deed, bonds of $100,000.00 were issued and $56,000.00 sold; that the remaining $44,000.00 of bonds were put up with certain parties, among which were the first five creditors above, for the purpose of securing loans with which to carry on the business,

The bankrupt claims that the payments to these five persons were not preferences for the reason that the claims were secured by bonds and that the bonds were secured by the trust mortgage. It is claimed that the payment to Long & Phillips was not a preference for the reason that that debt was for insurance on the property of the corporation, the party threatening to cancel the insurance if the payment was not made; it is also claimed this was not a preference because at the same time payments were made to other creditors for insurance.

The answer also alleges that the Pere Marquette Railroad Company and the United States Coal Company, two of the petitioning creditors, are estopped from filing or joining in the petition, because they consented to the payments alleged to be preferences. The answer also claims that the allegations of insolvency are insufficient.

The parties appeared before me on the 30th day of March, A. D., 1910, and were represented by their respective attorneys. Testimony was taken and numerous exhibits have been filed. The
324 depositions of two witnesses at St. Louis, Mo., have also been taken by stipulation.

The first five payments alleged as preferences, were payments upon notes which were endorsed by all or some of the officers or directors of the bankrupt.

Four questions of fact are involved in the issues and are, possibly, all of material importance, as follows:

First. Was the corporation insolvent?

Second. Were the payments preferences?

Third. Did the trust mortgage cover the moneys paid to creditors?

Fourth. Are petitioning creditors estopped?

First—Insolvency.

The testimony of Wm. A. Bahlke, George A. Aldrich and Ira D. Suydam is to the effect, in substance, that the total assets of the bankrupt, in June, 1909, did not exceed $25,000.00 to $30,000.00. That Feb. 28, 1909, it owed $56,000.00, on outstanding bonds, upwards of $15,000.00 on notes secured by deposit of treasury bonds as collateral, and on unsecured claims of upwards of $17,000.00, or total assets of $30,000.00 and liabilities of upwards of $88,000.00. (See Exhibit 6, for list of bills payable).

Second—Preferences.

The most important question in the case is whether or not the payments made by the bankrupt during the four months from Feb. 25, 1909, to June 25, 1909, were preferences within the meaning of the Acts of Congress relating to bankruptcy. It appears from Exhibit 6 that on January 21, 1909, the bankrupt was indebted to
the St. Louis Hardware Company in the sum of $986.55 on
325 a promissory note. Payments were made on this note within four months of the filing of the petition as follows: May

4, 1909, $119.63 and $61.12, these payments apparently having been made by turning over property; what this property was does not appear. It further appears from Exhibit 6, and the testimony of Mr. Bahlke, that the State Bank of Stanton, Commercial Savings Bank of St. Louis and Old National Bank of Grand Rapids, were paid, during the four months period, the amounts hereinbefore referred to and the same amounts set up in the creditors' petition. These amounts were paid on notes secured by deposit of treasury bonds, and all of which notes were endorsed by the directors of the bankrupt corporation. The condition of the Bills Receivable and Accounts Receivable of the bankrupt from Feb. 25, 1909, is as follows:

	Bills receivable.	Accounts receivable.
Feb. 25, 1909	$1,335.20	$16,588.59
March 31, 1909	1,100.27	8,112.65
April 30, 1909	1,100.27	7,756.75
May 31, 1909	1,100.27	5,476.96

This shows a reduction of the accounts and bills receivable from $17,923.79 on Feb. 28, 1909, to $6,577.23 on May 31, 1909, a difference of $11,346.56. An examination of Exhibit 6, shows that from Feb. 25, to May 31, 1909, upwards of $7,290.00 was paid to the creditors of the corporation and all of the amounts so paid excepting $190.00 to Phillips & Long, $125.00 to Aldrich & May and $180.75 to St. Louis Hardware Co., unsecured creditors, were paid to the directors of the corporation, or upon notes endorsed by the directors. It is apparent that a very large proportion of the money so paid was the money collected on the accounts and Bills
326 Receivable of the corporation. It does not appear that any sums whatever were paid during this period to the holders of the $56,000.00 of bonds of the corporation that had been sold, in fact, the contrary appears from the testimony.

It is perfectly apparent that the Board of Directors knew on March 22, 1909 (See Exhibit 5) that the corporation was insolvent and probably must go out of business unless ad-itional capital could be secured. The payment of notes endorsed by these directors were preferences; these notes were not entitled to any priority of payment over the bonds of the company that had been sold to parties not directors. Mrs. F. N. Wright's note of $5,000.00 was as much entitled to payment, or part payment, as were other notes endorsed by directors of the corporation. The payments to Phillips & Long, to Aldrich & May and to St. Louis Hardware Company, payments not secured, were clearly preferential payments. The fact that part of these payments were on notes for premiums for insurance past due, would not make the payments any the less preferences. I doubt very much if an insurance company or its local agent can cancel a policy because a note for the premium given to the agent has not been paid. In any event, the payment to the St. Louis Hardware Co. was clearly a preference.

Third—Did the Trust Mortgage Cover the Moneys Paid?

It is the claim of the bankrupt that the payments are not "preferences," in any event, for the reason that the money or fund used in making the payments was covered by the trust mortgage. The part of the mortgage material to this question is as follows:

"Also all of the following described personal property, goods, chattels, products and materials, viz: All materials, raw or manufactured, such as, etc., etc., and all other products of every
327 kind, nature or description, manufactured, owned or used by said company; and all chemicals and supplies of every kind and nature, including coal, etc., etc.,—and office furniture and fixtures. Also all contracts, etc., and all franchise and rights of every description." Also:

"It being the intention to include herein all of the property of the company, real, personal and mixed, so far as tangible and visible, which is now located upon said real estate herein described and in the buildings upon said premises * * * and which are now in possession or expectancy, now owned or hereafter acquired by said company, together with all and singular the tenements, hereditaments, rights, franchises, privileges and easements." (See mortgage, Exhibit 1.)"

A careful consideration of the terms of the mortgage, so far as it relates to personal property leads to the almost inevitable conclusion that the mortgage does not cover, and is not a lien upon, Accounts and Bills Receivable, nor upon the cash of the corporation. It would have been easy to have inserted in the mortgage a clause including these items, or a general omnibus clause covering all other personal property, choses in actions, etc.; this has not been done and the mortgage must be construed as it reads.

Fourth—Estopped.

Counsel for the bankrupt concedes that the Pere Marquette Railroad Company is not estopped and if this were not conceded, there is no testimony to show an estoppel, unless it be the testimony of Mr. Alger as to what Mr. Whitney, the Attorney of the Pere Marquette Railroad Company said: This evidence, if sufficient
328 to establish an estoppel, is clearly incompetent, as Whitney was dead when the testimony was given.

There is no testimony that any officer of the United States Coal Company ever agreed or consented to the payment of the moneys which were paid out and now claimed to have been preferential payments.

From the foregoing I find and report the following facts as established and proven, viz:

On June 25, 1909, when the petition was filed and for four months or more prior thereto, the St. Louis Chemical Company was insolvent and was known by its directors to be insolvent. During such four months period the corporation paid out the moneys al-

leged into the petitioning creditors' petition and these payments were preferences within the meaning of the Acts of Congress relating to bankruptcy. The moneys used in making these payments, or a very large part of the same, was not covered by the mortgage on the bankrupt's property. The petitioning creditors are not estopped from bringing this proceeding.

It therefore follows that an order should be entered adjudging the St. Louis Chemical Company bankrupt within the true intent and meaning of the Acts of Congress relating to Bankruptcy, and I so report and recommend.

I further report that I have this day mailed a copy of this report to the Attorney for the petitioning creditors and to the Attorney for the bankrupt.

LEE E. JOSLYN,
Special Master.

Dated Aug. 23, 1910.

Filed Aug. 25, 1910.

329 *St. Louis Chemical Company Declared Bankrupt.*

At a session of the District Court of the United States for the Eastern District of Michigan, Northern Division, continued and held pursuant to adjournment at the District Court Room in the City of Bay City in said District on Wednesday, the twenty-sixth day of April, in the year of our Lord, One Thousand Nine Hundred and eleven.

Present: The Honorable Henry H. Swan, District Judge.

No. 421. In Bankruptcy.

In the Matter of THE ST. LOUIS CHEMICAL CO., Bankrupt.

This cause came on to be heard on the reports and findings of Lee E. Joslyn, Special Master, and the same was submitted to the Court without argument, and the Court having taken time to consider its decision, and due deliberation being had thereon, it is now here by the Court ordered that said Report and Findings of the Special Master, be and the same are hereby confirmed and said Saint Louis Chemical Company of Saint Louis in the County of Gratiot in said District is hereby adjudged and declared bankrupt accordingly.

It is thereupon ordered that said matter be referred to George A. Marston, one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the Saint Louis Chemical Company, by one of its duly authorized officers, shall attend before said Referee forthwith, and
330 thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said bankruptcy.

(Signed) HENRY H. SWAN,
U. S. District Judge.

Filed April 26, 1911.

EXHIBIT Y-1.

St. Louis Chemical Company,
Chemical Manufacturers.

ST. LOUIS, MICHIGAN, March 25th, 1909.

United States Coal Co., Cleveland, Ohio.

GENTLEMEN: We have just had a long conversation with your attorney, Mr. William Bahlke, of Alma, Mich., concerning your account.

The Board of Directors met on the 22nd inst., and passed a resolution directing the manager to close the plant and begin at once the liquidation of the company's assets for the purpose of paying creditors.

Some $12,000 or $13,000 which was borrowed for working capital is secured by $44,000 treasury bonds. Our plan is first to pay off this indebtedness and retire these bonds, after which all receipts will be applied pro rata in the discharge of other indebtedness. We have already laid this plan before some of our very largest creditors and they have readily consented to it. In fact, they have conceded that it is the only feasible plan—one which without doubt will realize the greatest amount for the discharge of the company's indebtedness, in fact, this plan is practically a receivership without the attendent costs which, as you know, readily dissipate the assets of any corporation.

331 We trust that through your attorney we may have your hearty approval of this plan. Kindly let us hear from you at an early date.

Very truly yours,

(Signed) L. B. ALGER, *Sec.*

EXHIBIT A-2.

St. Louis Chemical Company,
Chemical Manufacturers.

ST. LOUIS, MICHIGAN, March 23rd, 1909.

Handy Bros. Coal Mining Co., Bay City, Mich.

GENTLEMEN: In pursuance with our conversation over the telephone we beg to lay before you the action of the Board of Directors as taken yesterday and its particular bearing on your account.

Owing to the depression in business and the consequent loss in operation, it has been deemed best to temporarily shut down. The manager has been directed to liquidate the quick assets as expeditiously as possible and to apply the receipts upon the outstanding indebtedness. It is hoped very much that this liquidation can be entirely accomplished by the last Tuesday in May, which is the date of our annual stockholders' meeting, when provision can be made for either the continuance of the business or a final dissolution of the company and a distribution of its remaining assets.

If this affair is properly managed and our creditors do not force a receivership, it is quite certain that we will be able to pay off a large percentage of our indebtedness within a few weeks.

332 We certainly regret that we will not be able to take care of our note falling due on Thursday next. We would suggest that you allow this matter to rest as it is for a few weeks, when no doubt, the matter will be settled to our mutual satisfaction.

Very truly yours,

ST. LOUIS CHEMICAL COMPANY,

(Signed) By L. B. ALGER, *Secretary.*

EXHIBIT B-2.

St. Louis Chemical Company,
Chemical Manufacturers.

ST. LOUIS, MICHIGAN, March 27th, 1909.

Michigan Salt Association, Saginaw, Mich.

GENTLEMEN: Owing to the depression in business, the directors decided at a recent meeting to temporarily suspend operations. At the same time they instructed the Manager to liquidate the company's quick assets as expeditiously and with as little expense as possible, applying the receipts first to the discharge of some $12,000 indebtedness secured by $14,000 treasury bonds, retiring these bonds. And second, to apply the remaining receipts pro rata upon open accounts. This would be in accordance with procedure that would follow in the event that the company was placed in the hands of a receiver.

It is believed that if we are allowed to carry out this plan, enough will be realized to pay almost, if not all, that is due creditors. This plan has already been laid before some of our largest creditors, who have conceded its fairness and consented to work with us in

333 carrying it out. This plan is practically a receivership without the attendant costs and delays. We are sure that you will approve and hope that you will write us to that effect at once.

If it is impracticable for you to send a representative here to investigate, we believe that it would be a good idea for you to refer your account to either Dun or Bradstreet, or to some attorney in this neighborhood, who can look into the matter personally.

It is hoped that this liquidation may be accomplished by the annual stockholders' meeting, which will be held on the last Tuesday in May, at which time ample provision will be made to continue the business or proper steps taken looking to the final dissolution of the company and distribution of its remaining assets.

We thank you in advance for your careful consideration in this matter and trust that we may have your approval by return mail.

Very truly yours,

ST. LOUIS CHEMICAL CO.,

(Signed) By L. B. ALGER, *Secretary.*

EXHIBIT E-2.

Sixtieth Congress.

Committee on the Postoffice and Post Roads,
House of Representatives,
Washington.

December 12th, 1908.

Saint Louis Chemical Company, Saint Louis, Michigan.

GENTLEMEN: Replying to your letter of the 8th instant,
334 I am satisfied to hold the coupons matured and maturing upon bond held by me, as requested.

Yours truly,
(Signed) A. B. DARRAGH.

EXHIBIT C-2.

Sixtieth Congress.

Committee on the Postoffice and Post-roads,
House of Representatives,
Washington.

May 13th, 1908.

Mr. L. B. Alger, Sec'y, St. Louis, Michigan.

DEAR SIR: I have received your favor of the 8th inst. advising me of the annual meeting of the St. Louis Chemical Company on May 26th. I will probably be in St. Louis at that time. I send proxy, however, to B. A. Church to use in the event of my absence.

Yours truly,
(Signed) A. B. DARRAGH.

335 EXHIBIT D-2.

Sixtieth Congress.

Committee on the Postoffice and Post-roads,
House of Representatives,
Washington.

ST. LOUIS, MICH., Nov. 23rd, 1908.

Mr. L. B. Alger, Sec'y, St. Louis, Mich.

DEAR SIR: Replying to your letter of the 21st inst., I withhold the coupons maturing June 1st and Dec. 1st upon bond held by me, until after your board meeting Nov. 24th, as requested.

Dic. to A. C.

Yours truly,
(Signed) A. B. DARRAGH.

EXHIBIT H-2.

December 8th, 1908.

Mr. Charles T. Babcock, St. Johns, Michigan.

DEAR SIR: The regular quarterly meeting of the Board of Directors was held Monday, November 30th, seven of the nine members

being present. At that time the condition of your company was carefully considered.

We regret to report that the plant has been operated at a loss during the past year. The general financial depression from which the whole country suffered, together with certain trade conditions, have brought about a state of affairs in the chemical business hitherto unknown in this country.

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The panic made it hard to operate for any manufacturing institution whose business covered a large extend to territory as does ours. The particular trade conditions referred to above have practically demoralized some branches of our business. For instances, the net price of salt cake a few months ago was $10.00 per ton f. o. b. the plant. Today it is $2.00, and even at this price we have many hundreds of tons in stock which we cannot at the present price sell at all.

The prices of acids have also gone down. The depression in these lines, however, has not been so marked.

You will readily see that the conditions which caused our loss were entirely beyond our control. Such a demoralization in trade cannot last. In fact, the price of muriatic acid is already going up. Other lines are bound to follow. Under normal conditions we would have been able to pay your interest promptly and to show a substantial profit.

These matters were carefully considered by the various members of the directorate, who are themselves heavy bondholders, and it is decided that just at the present time it would be quite impossible to take any money out of the business to meet the bond interest now due. The secretary was directed to fully and frankly lay these facts before the bondholders. Without exception, every bondholder is the owner of a large block of stock.

We ask you to carefully consider this matter. Any suggestions you may have will be gratefully received.

Thanking you for your courtesy, we beg to remain,

Very truly yours,

——— ———.

(Copy of letter sent to all bondholders.)

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EXHIBIT N-2.

Nov. 26th, 1908.

Mr. Cass T. Wright, Greenville, Mich.

DEAR SIR: We have telegraphed Mr. Cocke to come for a meeting Monday. You will therefore plan your visit to St. Louis accordingly.

Very truly yours,

——— ———.

EXHIBIT O-2.

March 12th, 1909.

Mr. Cass T. Wright, Greenville, Mich.

DEAR MR. WRIGHT: No doubt you will be at the meeting on Monday next. The company's note for $5,000 held by Mrs. Wright, is

secured by $5,000 in bonds. It is the intention to place more bonds back of this note, so if you will bring that note over with you next Monday, we will substitute a new one of the same date, making the collateral reach at least $9,000 in bonds. I trust that this will meet your approval and that it will be possible for you to bring the note in question.

Very truly yours,

338 EXHIBIT F-3.

St. Louis Chemical Company,
Chemical Manufacturers.

ST. LOUIS, MICHIGAN, Jan. 23rd, 1909.

Loesch, Scofield & Loesch, Chicago, Ill.

GENTLEMEN: Your favor of the 22nd inst., just received. There reached us this morning a telegram from Mrs. Slade, advising us that A. B. Slade has been appointed her agent to collect the rent due on the warehouse located at 249 Cherry Avenue, Chicago.

We appreciate your position in this matter and fully understand in every detail the steps you have already taken toward the collection of the amount due Mrs. Slade.

We have already called a special meeting of the Board of Directors to be held February 10th, for the specific purpose of raising more working capital. Our present working capital has been all tied up in the very large inventory which we have been forced to accumulate owing to the financial depression through which the country has passed. Immediately after this meeting you will hear from us. It would be impossible for us to make settlement before. We sincerely trust that it will be satisfactory to your good selves to allow this matter to rest as it is until that date, which will be just two weeks from next Wednesday.

339 Thanking you for your courtesy in this matter, we beg to remain,

Very truly yours,

ST. LOUIS CHEMICAL CO.,

(Signed) By L. B. ALGER, *Secretary.*

EXHIBIT F-3.

St. Louis Chemical Company,
Chemical Manufacturers.

ST. LOUIS, MICHIGAN, Jan. 27th, 1909.

Loesch, Scofield & Loesch, Att'ys, Chicago, Ill.

GENTLEMEN: Your favor of the 25th inst., just received and contents noted. We would strongly advise for the sake of your client's account that you grant us our request to leave this matter open until the special meeting of our Board of Directors, which meeting is called for February 10th, or two weeks from today.

If you know the condition we are positive that you would take this tion. To be explicit—we have a bond issue of $100,000. We have ot as yet paid the interest due December, 1908. These bonds cover l of the property, both real and personal, owned by this company. hould your suit be pressed, thus ruining our credit, the bondholders ould immediately step in and foreclose, thus tying up the prop- rty and eventually taking everything and probably wiping out the ndebtedness to Mrs. Slade.

Understand, gentlemen, that this is not written you as a threat. It is simply advising you of the exact condition. Should you see your way clear to grant our request to allow this matter to stand as it is until Feb. 10th, without doubt, the matter will e settled to the satisfaction of both your client and this company.

Very truly yours,

ST. LOUIS CHEMICAL CO.

(Signed) L. B. ALGER, *Sec.*

EXHIBIT Q-3.

St. Louis Chemical Company,
Chemical Manufacturers.

ST. LOUIS, MICHIGAN, March 2nd, 1909.

Port Huron Salt Co., Port Huron, Mich.

GENTLEMEN: We are just in receipt of your courteous favor of the 1st inst., and have carefully noted contents.

Without doubt, our Board of Directors will meet within the next two weeks, when arrangements will be made to make a proper adjustment of all our outstanding account. We trust that it will be convenient for you to allow this matter to rest until that time.

Very truly yours,

ST. LOUIS CHEMICAL CO.,

(Signed) By L. B. ALGER, *Secretary.*

N.

341 EXHIBIT G-3.

St. Louis Chemical Company,
Chemical Manufacturers.

ST. LOUIS, MICHIGAN, March 30th, 1909.

David Cole Creamery Co., Omaha, Neb.

GENTLEMEN: We are just in receipt of your favor of the 27th inst. and regret to note that you have placed your account against us in the hands of your attorney for collection.

Owing to the depression in business, we have decided to temporarily suspend operations. At a recent meeting of the Board of Directors the Manager was instructed to liquidate the company's quick assets as expeditiously and with as little expense as possible, applying the receipts upon the company's indebtedness.

We are unable to take care of your account in cash, but believe that we can make an arrangement whereby we can send enough acid and

carboys to practically discharge our indebtedness to you. We will charge the carboys to you at the usual price, you to retain same, thus entailing no loss to you, and at the same time enabling us to do the fair thing by you. Perhaps you can send the carboys to other manufacturers to be refilled.

We trust that this plan will meet your approval. Kindly write us to that effect at once. Thanking you, we beg to remain,

Very truly yours,

ST. LOUIS CHEMICAL CO.

(Signed) L. B. ALGER, *Secretary.*

N.

342 EXHIBIT P-3.

St. Louis Chemical Company,
Chemical Manufacturers.

ST. LOUIS, MICHIGAN, Feb. 27th, 1909.

Port Huron Salt Co., Chicago, Ill.

GENTLEMEN: Your favor of the 25th received. We are not in a position to send you a check for this account today, but hope to be able to take care of it before long. We expect to have a special meeting of the Board of Directors within the next two or three weeks for the purpose of raising additional working capital. We trust that it will be convenient for you to allow this matter to remain open a little longer.

Thanking you for your courtesy, we beg to remain,

Very truly yours,

ST. LOUIS CHEMICAL CO.,

(Signed) By L. B. ALGER, *Secretary.*

N.

EXHIBIT Z-1.

St. Louis Chemical Company,
Chemical Manufacturers.

ST. LOUIS, MICHIGAN, March 22nd, 1909.

Mr. Walter S. Cooley, Bay City, Mich.

DEAR SIR: For your information we beg to advise that the Directors of this company have decided for the present it is not
343 wise to continue operation of its plant located at St. Louis, Mich.

The price of all commodities manufactured by the company have declined so much during the past eighteen months that it is impossible to conduct the business profitably. It is believed that in the course of time conditions will be improved sufficiently to justify the company renewing operations. The plant has therefore been shut down and the manager has been instructed to realize on the quick assets of the company as expeditiously and with as little expense as possible, applying the proceeds to the payment of the company's creditors. It is believed that by this means there will be enough realized to pay almost, if not all, that is due creditors.

The entire assets of the company are covered by bonds outstanding to the amount of $56,000, and part of the other indebtedness of the company is secured by $44,000 of the company's bonds as collateral. It is the intention to pay first that part of the indebtedness which is secured by this $44,000 in bonds, so that they can be retired and cancelled and then the balance will be applied equally to other creditors. This would be in accordance with procedure that would be followed in the event that the company was placed in the hands of a receiver.

It is desired to avoid a receivership if possible because it would entail such a large expense and consequent loss to creditors. Handled as desired by the Directors, the company's assets will be realized in the best manner possible. In the event of a Receiver being appointed, it is feared that action would be taken by the bondholders to restrain any further payments to creditors, and of course this should be avoided if possible.

The plant is valued sufficiently to pay off bondholders in full and possibly, if the matter is judiciously handled, enough will
344 be realized to more than satisfy all outstanding claims against the company.

We write you this with a view of advising you of conditions, but do not believe that it would be wise to have this information given broadcast yet for the reason that if it became generally known that the company intended to close up its affairs in this way for the time being it would undoubtedly interfere with and greatly retard the collection of its outstanding accounts and the sale of its remaining saleable inventory.

It will be our utmost endeavor to protect every creditor as much as possible and anyone desiring further information can secure the same by writing to the company.

Very truly yours,

(Signed) ST. LOUIS CHEMICAL COMPANY.
W. H. COCKE, *President.*

Articles of Association.

In the Articles of Association of the St. Louis Chemical Company, it was certified that the amount of cash paid in was $30.00; real estate plant of the New Jersey Corporation, $114,759; accounts receivable of said New Jersey Corporation, $11,000; and good will of said New Jersey Corporation, $229,211; with outstanding bonded indebtedness of $56,000.

The articles were executed by L. B. Alger, W. H. Cocke, B. E. Harrison and H. J. Tuger on May 15th, 1907, before Frank M. Thedgar, Notary Public.

345 EXHIBIT 2.

Annual Report of Dec. 31, 1908.

This report is in usual form and shows among other things the following: All other property, plant, goodwill, etc., $315,526.89;

also a total indebtedness of $105,705.65, and is signed by Directors Pfeifler, Wright, Cocke, Tuger and Harrison.

And shows a list of 165 stockholders, among whom are:

Geo. S. Aldrich, St. Louis, Mich.	5	shares
W. R. Brewer, St. Louis, Mich.	50	"
B. A. Church, St. Louis, Mich.	200	"
Alice M. Church, St. Louis, Mich.	50	"
Carrie M. Church, St. Louis, Mich.	50	"
James Crawford, St. Louis, Mich.	100	"
H. H. Carty, St. Louis, Mich.	50	"
J. A. Elwell, St. Louis, Mich.	200	"
D. E. Harrison, St. Louis, Mich.	1,895	"
F. C. Henry, St. Louis, Mich.	425	"
Lewis B. Hoffstetter, St. Louis, Mich.	90	"
E. J. Hoffstetter, St. Louis, Mich.	390	"
L. R. Hoffstetter, Trustee	125	"
Carl Harrington, Trustee	50	"
Stiles Kennedy, St. Louis, Mich.	2½	"
Helen L. Kneeland, St. Louis, Mich.	390	"
Frank Kneeland, St. Louis, Mich.	7½	"
George R. Long, St. Louis, Mich.	150	"
A. B. Darragh, St. Louis, Mich.	375	"
A. S. McIntyre, St. Louis, Mich.	50	"
George G. Nichols, St. Louis, Mich.	25	"
A. L. Noyes, St. Louis, Mich.	100	"
Felix O'Melia, St. Louis, Mich.	200	"
Wm. Reynolds, St. Louis, Mich.	50	"
B. P. Smith, St. Louis, Mich.	62½	"
346 Geo. R. Scriver, St. Louis, Mich.	25	"
Henry Tuger, St. Louis, Mich.	591½	"
Dane H. Vincent, St. Louis, Mich.	25	"
Milo D. Vincent, St. Louis, Mich.	50	"
F. G. Warner, St. Louis, Mich.	200	"
W. L. Yost, St. Louis, Mich.	257½	"
W. H. Cocke, St. Louis, Mo.	1,494	"
Wm. Hugh, Morley, Mich.	800	"
M. Lowenstein, New York	375	"
C. H. Laflamboy, St. Louis, Mich.	1,463	"
Pfeifler & Burch, Edmore, Mich.	1,126	"
Cass T. Wright, Greenville, Mich.	650	"

List of Claims Allowed in Bankruptcy Court.

The claims allowed consisted of fifty-seven claims of varying amounts aggregating $15,087.12.

Said claims included a note of $551.07, given Nov. 20, 1908, due four months at Gratiot County State Bank to J. T. Baker Chemical Company, and protested for non-payment by Frank M. Thedgar, Notary Public, on March 22, 1909; also a note dated Nov. 20, 1908, due ninety days, payable to J. T. Baker Chemical Company, at Gratiot County State Bank and protested Feb. 18, 1909.

347 Exhibit I, Sheets 1—2—3—4. St. Louis Chemical Co.

Date 1908		Checks in Detail			Total Checks	Deposits	Balance	
June	30						1160 57	
July	1	411 78 177 61			589 39		610 18	
"	2				50 00	281 54	841 72	
"	3				254 40	925 47	1512 79	
"	6				25 00	757 45	2245 24	
"	7				150 00		2095 24	
"	8	50 00 75 00			125 00		1970 24	
"	9	L C.			986 66	378 95	1362 53	
"	10				10 28		1352 25	
"	11				266 55	40 75	1126 45	
"	13				80 06	298 03	1344 42	
"	14					7 04	1351 46	
"	15	69 86 50 00			119 86	135 22	1366 82	
"	16	70 00 1342 50	81 67		1494 17	1915 78	1788 43	
"	17	40 00 25 20	150 00 34 31		249 51		1538 92	
"	18	32 24 13 55	500 00 150 00		695 79	505 00	1348 13	
"	20	876 79 11 23	3 00 263 80	14 54	1169 36	48 68	227 45	
"	21				85 45		142 00	
"	22				75 00	332 74	399 74	
"	23				86 46		313 28	
"	24	101 50 6 79	60 00		168 29	136 78	18 23	red ink entry
"	25				50 00		68 23	" " "
"	27					376 88	308 65	
"	28				125 00	105 05	288 70	
"	29	11 73 75 00	260 15		346 88	35 15	23 03	" " "
"	30					548 42	525 39	
"	31					352 63 3 77	878 02	
Aug.	1	4 00 5 44 75 00	402 24		441 68	182 77	652 88	
"	3	14 60			89 00	18 51 2 78	582 39	
"	4					553 81	1138 98	
"	5	75 00 25 00 35 00	671 25		771 25	330 27 5 16	698 00	
"	6	21 00 189 00			56 00	1067 69	1714 85	
"	7	315 00			504 00	124 17	1335 02	

348 Exhibit I, Sheets 1—2—3—4 St. Louis Chemical Co.

Date 1908		Checks in Detail			Total Checks	Deposits	Balance	
Aug.	8	217 85	11 35		269 95		1065 07	
		10 75						
"	10	149 00	12 16					
		9 00			170 16		894 91	
		50 00	550 38			108 77		
"	12	75 00	285 75		970 13	364 47	289 02	
						632 80		
"	13					6 77	1289 85	
		11 70				290 26		
"	15	878 82			890 32	337 88	737 36	
		25 00						
"	17	2 50			27 50	76	710 02	
"	17						710 02	
		125 00				359 92		
"	18	100 00			225 00	472 01	1068 15	
"	19				1118 75	321 80	241 20	
		312 75						
"	20	291 50			604 25	28 47	331 58	red ink entry
					184 00		518 58	" " "
"	21					701 85		
"	22				34 75	185 22	423 74	
"	24				100 00		323 74	
"	25					647 39	971 23	
"	26				464 61		506 57	
		10 00						
"	27	100 00			110 00	336 62	733 19	
"	28				346 60	29 60	416 19	
"	29					145 97	562 16	
		64 57	186 25					
"	31	21 65	75 10		356 57		205 59	
Sept.	1				115 14	215 55	306 00	
					15 00	3 36	324 36	
"	3					220 61		
"	4				627 25	429 31	393 26	
"	5				162 00	88	131 24	
		200 00				75 00		
"	8	19 50			219 50	919 92	911 42	
"	9				25 00	4 66	888 08	
						12 51		
"	10				75 00	68 77	880 35	
"	11				502 75		183 61	
		19 17	315 45			399 72		
"	12	100 00	10 50		466 12	651 73	969 94	
		150 00	50 00					
"	14	75 00	60 00	345 00	680 00	317 40	616 74	
		7 50						
"	15	30 00			37 50	131 10	710 34	
"	16				100 00	1203 26	1813 30	

349 Exhibit I, Sheets 1—2—3—4. St. Louis Chemical Co.

Date 1908		Checks in Detail		Total Checks	Deposits	Balance	
Sept.	17			2085 09		871 79	red ink entry
"	18				310 81	530 98	" " "
"	21				390 65	170 33	" " "
"	22	50 00	310 95	460 95	449 99	181 29	" " "
"	23	100 00			139 71	41 58	" " "
"	24			50 00		91 58	" " "
"	25				287 35	195 77	
"	26				252 47	13 58 461 82	
"	28	17 12	283 05	410 17	48 56	100 21	
"	29				61	100 82	
"	30				100 38	201 20	
Oct.	1	2 75 6 00		9 65	323 45	515 00	
"	3	150 00 881 95	2 16	1034 11	4 16 68 68	446 27	" " "
"	5	280 00 25 00	200 00	505 80	881 63	70 44	" " "
"	5					70 44	" " "
"	6			37 40		107 84	" " "
"	7	5 04 150 00		155 04	79 91 570 72	387 75	
"	8			10 00		377 75	
"	9			34 50	215 22	558 47	
"	10				275 12	833 59	
"	12	315 00 44 40		359 40	1234 82	1709 01	
"	13	659 26 116 67	338 95 58 34	1173 22	549 59	1085 38	
"	14	150 00 401 11		551 11	133 34	667 61	
"	15			671 25		3 64	red ink entry
"	16	130 00 247 26	6 30	383 56	247 25 246 06	109 14	
"	17			8 55	90 90	188 46	
"	19	134 50 63 19		197 69		9 14	" " "
"	20			92 16	160 11	97 81	
"	21	100 00	22 25		58 56		
"		34 26	286 35	442 86	418 57	102 08	
"	22			42 96	797 97	857 09	
"	23	9 36 120 00		129 36	245 89	973 62	

350 Exhibit 1, Sheets 1—2—3—4. St. Louis Chemical Co.

Date 1908		Checks in Detail		Total Checks	Deposits	Balance	
		208 30					
Oct.	24	30 26		238 66		734 96	
	26	36 70	100 00				
"		100 00	671 25	907 95	523 39	370 10	
		25 00	125 00				
"	27	19 80	315 45	485 25	8 40	126 45	[illegible]
					3 18		
"	28			6 96	248 59	118 36	
		337 90					
"	29	10 75		348 65		230 29	" " "
"	30			15 40		245 69	" " "
					287 91	39 68	
"	31			6 70	4 16		
		67 96					
Nov	2	50 00		117 80	232 91	154 69	
					12 20		
"	4			196 54	248 95	219 30	
		4 46	109 54				
"	5	150 00	305 80	569 57	307 30	17 03	
"	6			125 00	118 20	10 23	
		25 00					
"	7	134 04		154 04		118 81	[illegible]
					187 85		
"	9			18 02	5 76	26 78	
"	10				182 58	209 36	
					175 00		
"	11			175 00	662 81	873 16	
		671 25	209 75				
"	12	26 94		957 94	588 84	507 06	
		2 10					
"	13	39 85		41 95	5 18	465 29	
		30 00	211 02		224 25		
"	14	16 80		251 82	316 94	781 63	
		10 75	190 00				
"	16	69 10		179 85	209 15	813 93	
		300 00					
"	17	30 00		330 00		483 93	
		150 00					
"	18	81 67	15 00	246 67	98 27	535 53	
		75 00					
"	19	32 76		107 76	412 67	640 44	
"	19					640 44	[illegible]
		300 04	135 00				
"	20	23 33	16 62	467 99	1245 53	1417 98	
"	21			20 00		1397 98	
		50 00					
"	23	10 27		60 27	184 35	1522 06	
"	24				414 33	1936 39	
		208 27					
"	25	315 00		522 17	200 07	1674 29	
		100 00					
"	27	100 00		200 00	152 20	1626 49	
"	28			214 20	385 76	1798 05	
		125 00					
"	30	83 84	550 38	708 19	458 61	1488 47	
Dec.	1	34 19	34 00	165 14		1323 33	
		96 95					

35 Exhibit I, Sheets 1—2—3—4. St. Louis Chemical Co.

Date 1908		Checks in Detail			Total Checks	Deposits	Balance	
		394 99	200 00					
Dec.	2	6 00			600 99		722 34	
"		22 14	14 42					
"	3	883 63			920 19	431 99	234 14	
"	4					16 54	250 68	
"		178 43						
"	5	25 00			203 43		47 25	
"		10 75						
"	7	200 00			210 75	76 50	87 00	red ink entry
"	8				150 00	238 50	1 50	
"						10 05		
"	9				132 45	598 75	477 85	
"	10					125 91	603 76	
"		550 38	26 25	17 46				
"	12	671 25	274 00	9 45		533 96	340 30	
					1557 79	760 37		
"	14					263 11	603 41	
						716 08		
"	15				39 00	139 29	1419 78	
		317 39	40 00					
"	16	200 00	100 00		657 39	400 71	1163 10	
		200 00						
"	17	35 00			235 00	229 84	1157 94	
"	18				20 00		1137 94	
		3 18	23 96					
"	19	200 00			227 14	2120 64	3021 44	
		659 26	10 75					
"	21	32 76	318 03	133 33				
					1154 13	19 64	1896 95	
"	22				75 00	226 17	2048 12	
"	23	L. C.			1010 46	149 01	1186 67	
		37 90	12 50		85 40			
"	24	35 00				30 67	1131 94	
		87 35						
"	26	50 00			137 35		994 59	
		150 00	335 64					
"	28	245 16			730 80	274 08	537 87	
"	30				92 70	15 79	460 96	
"	31				5 00	13 99	469 95	
						100 41		
1909		671 25						
Jan.	2	44 58			715 83	871 37	734 90	
		214 55						
"	4	100 00			314 55		420 35	
		35 85						
"	5	87 36	120 00		243 21	75 40	252 63	
		100 00	88 29					
"	6				15 90		236 73	
"	7	75 00			263 29		26 36	red ink entry
						20 84		
"	8				63 00	42 85	25 87	" " "
"	8						25 87	Bal. brot. fwd.
"	9	99 15	25 00				689 58	
"		8 00	232 53		364 68	9 28	308 31	

352 Exhibit I, Sheets 1—2—3—4. St. Louis Chemical Co.

Date 1909		Checks in Detail			Total Checks	Deposits	Balance	
		45 26	6 34			18 65		
Jan.	11	31 95	559 38		642 93	2 77		
						350 13	36 93	
		72 80						
"	12	20 22			93 02	119 11	63 02	
		15 60	8 75	2 36				
"	13	233 70	33 80		291 21	345 81	114 62	
		22 14	1 00					
"	14	17 48	2 38		43 00		71 62	
		2 38						
"	15	50 00	90 14		142 57		70 95	red ink ov
		100 00	2 57		341 41			
"	16	160 13	22 41		284 71	18 62	34 37	
		35 00	10 00					
"	18	10 75			55 75		24 38	" "
		316 60				231 70		
"	20	56 09			372 69	242 20	79 83	
		146 96						
"	21	21 68			168 64	107 95	19 14	
		93 62						
"	22	105 74			199 36		180 22	" "
"	23				20 50	24 15	176 57	" "
		28 49						
"	25	75 00			103 49	256 81	23 25	" "
		71 91				179 00		
"	26	5 70			77 61	88 54	166 65	
"	27					254 03	420 68	
		24 44	539 38			97 12		
"	28	92 00	317 85		993 67	841 85	365 98	
"	29				100 00		265 98	
"	30					10 12	276 10	
		315 45	11 72			626 76		
Feb.	4	32 65	258 00		617 82	21 56	370 60	
"	5	3 85	116 67	58 34				
		15 52	400 00	25 00	619 38	363 47	120 69	
"	6				75 00		45 69	
		30 00	301 00			421 87		
"	8	75 00	87 50		192 50	729 35	701 41	
		35 00	200 00					
"	9	100 00	133 00		468 00		236 41	
"	10				7 37	69 39	298 43	
		200 00				12 33		
"	11	239 30	32 97		472 27	406 12	244 61	
"	12					76 49	221 10	
"	13				200 00		121 10	
		100 00						
"	15	50 00			150 00	170 65	141 75	
		72 85						
"	16	35 11	103 79		211 75		70 00	red ink ov
"	17				37 11	88 11	19 00	" "
"	19					154 55	135 55	
"	20				231 90	280 45	184 10	

553 Exhibit 1. Sheets 1–2–3–4. St. Louis Chemical Co.

Date 1909		Checks in Detail			Total Checks	Deposits	Balance	
		4 69	30 75			438 09		
Feb.	23	300 00	208 65	40 40	584 49	576 89	614 59	
		150 00						
"	24	89 56			239 56	366 15	741 18	
"	24					23 51	764 69	
"	25				1 93		762 76	
						1752 35		
"	26	L.C.			1534 48	197 51	1178 17	
		25 00	4 73			250 80		
"	27	200 00	1 00		230 73	40 13	1238 37	
"	27						1238 37	Bal. brot wd.
		50	1000 00					
Mar.	1	10 72	13 62		1024 84		213 53	
		13 10						
"	2	3 48			16 58		196 95	
"	3				11 85	89 63	274 73	
		200 00	25 00					
"	4	125 00			350 00	412 48	337 21	
		174 25	100 00			2 08		
"	5	80 25			354 50	152 34	137 13	
		100 00	50 00					
"	6	200 00	57	4 50	355 16	279 66	61 63	
		16 20				591 33		
"	8	200 00			216 20	5 55	442 31	
"	9					3 89	446 20	
		8 10	300 00					
"	10	14 00			322 10		124 10	
						850 00		
"	12	L.C.			1399 06	795 63		
						731 65	702 41	
		25 00	500 00	300 00		834 67		
"	13	400 00	500 00	125 00	1850 00	582 45	269 53	
"	15	L.C.			1947 50	2013 46	335 49	
"	16				8 35		327 14	
		13 45						
"	17	53 23			67 68		259 46	
						102 72		
"	18				61 00	1 33		
						53 99	356 50	
		125 03						
"	19	58 47			183 47		173 03	
"	20	3 40	300 00	20 00	557 29	671 10	286 84	
		33 89	200 00					
"	22				50 00		236 84	
		100 00	500 00			531 82		
"	23	35 00			1935 00	362 77		
						95 90	292 33	
		7 61	100 33		118 29	120 79	294 83	
"	24	1 35						
		100 00	1 50		112 22		182 61	
"	25	10 72						
"	27	77 25						
		50 00			107 25		75 36	
"	29				1 25		74 11	
"	30				27 16		46 95	

354 Exhibit I, Sheets 1—2—3—4. St. Louis Chemical Co.

Date 1909		Checks in Detail		Total Checks	Deposits	Balance	
		12 47					
Mar.	31	442 39		454 86	542 82	131 91	
		1 50					
April	2	34 31		35 81		99 10	
		2 39					
"	3	52 30		54 69		44 41	
"	8			75 00	141 12	110 53	
"	9			38 08		72 45	
		3 00	75 00				
"	10	54 50	250 00	382 50	357 56	47 51	
"	14				5 35	52 86	
"	16			10 72	104 87	147 01	
"	17			63 15		83 86	
"				69 30		14 56	
					84 12		
"	21				279 90	98 68	
"	24			300 00	116 60	195 18	
		9 00					
"	27	2 00		11 00	10 21	194 39	
"	28			61 25		133 14	
"	28					133 14	Bal. brot fwd
"	30			18 08		115 06	
				4 90		111 06	
May	1	305 12	500 00		836 03		
"	3	54 95	10 05	870 12	140 50	217 47	
"	4			100 00		117 47	
"	5			3 00		114 47	
"	6			44 88		69 59	
"	10			67 50	493 40	495 49	
		400 00					
"	11	10 77		410 77		84 72	
"	13			10 72		74 00	
		4 66					
"	14	3 58		8 24		65 76	
					1 97	67 73	
"	15				7 64	66 84	
"	17			13 00	4 47		
"	18			10 68		56 16	
"	19			6 05		50 11	
		14 00					
"	20	2 40		16 40	153 13	186 84	
"	22			37 30		149 54	
"	25			63 20		86 34	
"	26			50 00		36 34	

355 Exhibit I, Sheets 1—2—3—4. St. Louis Chemical Co.

Date 1909		Checks in Detail			Total Checks	Deposits	Balance	
June	1				43 49	100 00	92 85	
"	2				75 00		17 85	
"	4					36 66	54 51	
"	7				6 50		48 01	
"	10				28 50	16 86 422 24	458 61	
"	11				18 25		440 36	
"	14				30 75		409 61	
"	17				27 00		382 61	
"	23	23 36 300 00			323 36		59 25	
"	25				25 25	11 25 196 11	241 36	
"	28					7 01	248 37	
"	30				25 25	47 09	270 21	
July	1				4 50		265 71	
"	2				10 72		254 99	
"	3					192 31	447 30	
"	10				15 75		431 55	
"	13				6 10		425 45	
"	17	12 25 11 50 7 00			23 75 19 25		401 70	
"	24	12 25					382 45	
"	28					27 85	410 30	
"	29						410 29	Bal. brot fwd.
1911 July	18				410 30		000 00	

356 *Certificate of Court.*

(Filed —— —, ——.)

STATE OF MICHIGAN,
County of Gratiot, ss:

I hereby certify that the foregoing Bill of Exceptions contains all of the testimony and proceedings material to the questions raised, and where questions and answers are inserted, it is deemed necessary to a proper understanding thereof; and that the annexed assignments of error were attached thereto at the time of the settlement of this Bill of Exceptions.

Dated April 3, 1915.

KELLY S. SEARL,
Circuit Judge.

O. K.
LYON & MOINET.

Assignments of Error.

STATE OF MICHIGAN:

The Circuit Court for the County of Gratiot.

D. LLOYD JOHNSON, Trustee, etc., Plaintiff,

vs.

GRATIOT COUNTY STATE BANK, Defendant.

Now comes the defendant and alleges that there is manifest error in the proceedings and trial of the above entitled cause, in this, to-wit:

1.

The Court erred in permitting plaintiff's counsel to read to the jury the creditor's petition in bankruptcy, filed in the case of the St. Louis Chemical Company, Bankrupt.

357 2.

The Court erred in permitting the plaintiff's counsel to read to the jury the answer of the St. Louis Chemical Company to the petition of the creditors to have it adjudged a bankrupt.

3.

The Court erred in denying the motion of the defendant to strike out the contents of the petition in bankruptcy, and the answer of the St. Louis Chemical Company thereto aforesaid.

4.

The Court erred in permitting the plaintiff to read to the jury that portion of the petition in bankruptcy referring to the defendant in this case.

5.

The Court erred in permitting the plaintiff to read to the jury the report and opinion of Lee E. Joslyn, special master in the bankruptcy case.

6.

The Court erred in permitting the plaintiff to read to the jury the request for findings filed in the bankruptcy case.

7.

The Court erred in permitting the plaintiff to read to the jury the order of adjudication in the matter of the St. Louis Chemical Company, a bankrupt.

8.

The Court erred in permitting the plaintiff to read to the jury the schedule filed by the bankrupt.

9.

The Court erred in permitting the plaintiff to read to the jury the petition of the Gratiot County State Bank, filed in the suit of the Security Savings Bank & Trust Co. vs. The St. Louis Chemical
358 Company, and in that connection in holding and saying: "I take it for granted that this jury is intelligent enough not to be prejudiced by anything that I afterwards tell them is not for them to determine at all. I don't say this is, or is not, for them. When we get through I will sift out and will tell them what they will have to determine, and what testimony they may use."

10.

The court erred in permitting the plaintiff to read to the jury the opinion filed by the Circuit Judge in the case of the Security Savings Bank and Trust Co. vs. The St. Louis Chemical Co.

11.

The court erred in sustaining the plaintiff's objection to the witness Henry, "What have you to say, on May 25th, 1909, if the value of the property at a fair valuation was sufficient to pay the obligations of the St. Louis Chemical Company.

12.

The court erred in sustaining plaintiff's objection to the question to plaintiff's witness Henry, "Can you describe the character of the buildings, of the land and the property of the Chemical Company, that they had there on the 31st day of March, 1909."

13.

The court erred in striking out the answer, "I don't," to the question to the witness Henry, "If any payments were made do you know of any intent on the part of the Chemical Company to prefer one creditor against the other."

14.

The court erred in sustaining the objection to the plaintiff's witness Henry, "Were there any conveyances, transfers, assignments or incumbrances of the property of the St. Louis Chemical Com-
359 pany or any part thereof to any person with the intent to hinder, delay or defraud its creditors."

15.

The court erred in sustaining plaintiff's objection to the question to the witness Henry, "What was the condition of the company and what property did it have prior to February 26th, 1909?"

16.

The court erred in sustaining the plaintiff's objection to the question to the witness Henry, "Was there any change in the outward appearance of the Chemical Company plant at St. Louis after February 26th and up to March 31st, as compared with its appearance before that time."

17.

The court erred in sustaining plaintiff's objection to the question to same witness, "Was the chemical plant being operated in the usual way, in the employment of men, and carrying on the business, during the months of January, February and March and up to the annual meeting on May 25th, 1909?"

18.

The court erred in sustaining the objection of plaintiff to the question to the witness Henry, "Was the plant absolutely shut down and not in a going condition, until after the action taken by the stockholders on May 25th, 1909?"

19.

The court erred in sustaining the plaintiff's objection to the question to plaintiff's witness Henry, "Do you know of any reason why the Chemical Company's property at a fair valuation, during the months of January, February and March, April and May, was not sufficient to pay its indebtedness."

360

20.

The court erred in sustaining the plaintiff's objection to the question to the witness Henry, "Do you know what the assets and liabilities of the St. Louis Chemical Company were, at the time of the filing of their last annual report in December, 1908?"

21.

The court erred in sustaining the objection of the plaintiff to the question to the witness Henry, "State if you know when the plant shut down and stopped doing business?"

22.

The court erred in permitting the plaintiff to read to the jury entries upon the books of the Chemical Company regarding the objects and purposes of the checks, and such entries not being noted in any manner upon the checks themselves."

23.

The court erred in overruling the defendant's objection to the question to witness Thedgar, "I next read in evidence under date of April 10th, 1909, State Savings Bank, Stanton, on note in column headed 'Bank' the figures $250. Have you the check by which that payment was made?" and in that connection in permitting the plaintiff to introduce evidence of payments made by the Chemical Company subsequent to March 31st, 1909.

24.

The court erred in receiving in evidence Exhibit Y-1, offered by plaintiff.

25.

The court erred in receiving in evidence Exhibit A-2, offered by plaintiff.

26.

The court erred in receiving in evidence Exhibit B-2, offered by plaintiff.

361 27.

The court erred in receiving in evidence Exhibit G-2, offered by the plaintiff.

28.

The court erred in overruling the defendant's objection to the question to the witness Bernard, "Did you have any conversation with Mr. Henry previous to the taking of the note whereby he made arrangements with you for having it discounted at your bank?"

29.

The court erred in sustaining the objection of plaintiff to the cross-examination question to the witness Bernard, "I want to ask you if at any time previous to April 1st, 1909, you ever heard the financial standing and solvency of the St. Louis Chemical Company questioned.

30.

The court erred in sustaining the plaintiff's objection to the question to the witness Bernard, "Describe the St. Louis Chemical factory?"

31.

The court erred in refusing to strike out the answer of the witness Tuger, "I don't know that I had reason to think I could not examine them (books of the Chemical Company) if I cared to."

32.

The court erred in sustaining the plaintiff's objection to the question to the witness Tuger, "State whether or not during the months of February and March, 1909, the company had sufficient property at a fair valuation to pay all its indebtedness?" and in holding and deciding in that connection that the judgment of the United States Court was res adjudicata as to the fact of insolvency in this case.

33.

362 The court erred in sustaining the objection of the plaintiff to the question to the witness Tuger, "What did the wind storm, or cyclone of July 2nd, 1909, do to the Chemical Company plant?"

34.

The court erred in overruling the objection of the defendant to the question to plaintiff's witness French, "You remember, do you not, that in February, March and April, 1909, your bank received

payments upon a note which you held against the St. Louis Chemical Company?"

35.

The court erred in refusing to strike out the testimony of the plaintiff's witness, Cass T. Wright, "I don't know that it was particularly talked there that it was difficult to keep the company afloat; but he gave that impression; it was my understanding; could not give the particulars of that now, only merely he gave the idea that it was going to be difficult to keep the thing afloat, as I understood it; that is as I remember it."

36.

The court erred in receiving in evidence the plaintiff's Exhibit Z-1, the same being a letter written by the secretary of the Chemical Company, addressed to Handy Bros. Mining Co.

37.

The court erred in admitting in evidence plaintiff's Exhibits U-2, W-2, R-2, S-2, T-2, X-2, Y-2, Z-2, A-3, B-3, C-3 and D-3, same being bills of lading with drafts attached.

38.

The court erred in sustaining the objection of plaintiff to the cross-examining question of defendant to the witness Livingstone (the station agent at St. Louis), "Is it not a matter of frequent occurrence to have the business men of St. Louis receive goods
363 by bill of lading with draft attached"; and also in that connection in sustaining the objection of the plaintiff to the following question to the same witness, "What is the fact as to whether Felix O'Melia frequently has shipments made to him of goods by order bill of lading with draft attached?"

39.

The court erred in refusing to strike out the testimony of the witness Bahlke as to what Alger had told him the Board of Directors of the Chemical Company had agreed to do.

40.

The court erred in receiving the testimony of the witness Bahlke as to what Alger told him as to the value of the Chemical Company plant and that it was impossible to make money with it.

41.

The court erred in denying the defendant's motion made at the conclusion of the plaintiff's proofs to direct a verdict for the defendant.

42.

The court erred in overruling the objection of the defendant to the plaintiff's question to the witness B. A. Church, "You had no doubt but if you had asked Mr. Alger he was able to give you a statement of the financial condition and prospects of the company?" and in overruling such objection deciding and ruling that such testimony bore upon the only issue that he should submit to the jury, if he submitted the case to the jury.

43.

The court erred in holding that whatever appeared upon the books of the Chemical Company might bear upon the question as to whether the defendant had reasonable cause to make inquiry; and in that connection permitting the plaintiff to introduce
364 in evidence the cash book of the Chemical Company to show the purpose for which certain checks were given by that company.

44.

The court erred in refusing the defendant's motion made at the conclusion of the proofs in the case, to direct a verdict in favor of the defendant.

45.

The court erred in refusing the defendant's first request to charge.

46.

The court erred in refusing the defendant's second request to charge.

47.

The court erred in refusing the defendant's third request to charge.

48.

The court erred in refusing the defendant's fourth request to charge.

49.

The court erred in refusing the defendant's fifth request to charge.

50.

The court erred in refusing the defendant's sixth request to charge.

51.

The court erred in refusing the defendant's sixth request to charge.

52.

The court erred in refusing the defendant's seventh request to charge.

53.

The court erred in refusing the defendant's eighth request to charge.

365 54.

The court erred in refusing the defendant's tenth request to charge.

55.

The court erred in refusing the defendant's thirteenth request to charge.

56.

The court erred in refusing the defendant's fourteenth request to charge.

57.

The court erred in refusing the defendant's fifteenth request to charge.

58.

The court erred in refusing the defendant's sixteenth request to charge.

59.

The court erred in refusing the defendant's request numbered 16½.

60.

The court erred in refusing the defendant's seventeenth request to charge.

61.

The court erred in refusing the defendant's eighteenth request to charge.

62.

The court erred in refusing the defendant's nineteenth request to charge.

63.

The court erred in refusing the defendant's twenty-second request to charge.

64.

The court erred in refusing the defendant's twenty-third request to charge.

65.

The court erred in refusing the defendant's twenty-fourth request to charge.

366

66.

The court erred in charging the jury as follows: "The court determines for you that the Chemical Company was in fact insolvent during the entire time from the first day of January, 1909, down until the last payment to the bank involved here; and you may start out with the proposition settled that all the moneys deposited in the bank from which these payments were made were also deposited and the payments made at a time when the Chemical Company was in fact insolvent; and in that connection I give you the plaintiff's first request to charge. The St. Louis Chemical Company was insolvent within the meaning of the Bankruptcy Act during all the time from and including February 26th, 1909, to and including June 25th, 1909, that being the date on which the petition in bankruptcy was filed."

67.

The court erred in charging the jury as follows: "The St. Louis Chemical Company made or adopted a plan of disposing of some of its property and collecting in its quick or readily collectible assets and using the money arising from these sources to pay off and discharge certain debts, held by some of its directors or upon which some of its directors were liable, and I advise you that this scheme or plan was in violation of both the letter and the spirit of the Bankruptcy Act and that in carrying it out the Chemical Company acted in fraud of its creditors."

68.

The court erred in charging the jury that the United States Court had determined the question that the Chemical Company was insolvent from February 26th, 1909, down to and including June 25th, 1909, and that such determination was res adjudicata in this case and settled the question; and that under the undisputed
367 evidence in this case the Chemical Company was in fact insolvent from January 1st down through all that time.

68½.

The court erred in charging the jury as follows: "So gentlemen you will see that two questions are determined for you by the court: the question that the Chemical Company was in fact insolvent during the time I mentioned, and the question that they did enter into an unlawful scheme, which in law we call fraudulent under the Bankruptcy law; that does not mean necessarily that any person is guilty of what the word fraud sometimes means to you, but it was fraudulent under the bankruptcy law. I determine that they did enter into such a scheme as that and I determine, that the Chemical Company did put these moneys in the bank, and paid them out with the fraudulent intent to prefer some of its creditors. Those questions are settled for you by the court."

69.

The court erred in charging the jury as follows:

"I further instruct you as a matter of law that the payments upon this note were made by the Chemical Company with intent upon the part of the Chemical Company to create an unlawful preference under the bankruptcy law and to prefer defendant over other creditors of the same class, and you may treat that question as settled by the court for you."

70.

The court erred in saying to the jury in connection with defendant's 24th request to charge as follows:

"That is true as an abstract statement of law but I say to you in that connection, but you have a right to determine that fraud has been proven by circumstances as well as by actual evidence in the case. I mean by somebody saying so, or stating some
368 fact from which you determine it. In other words, you take into consideration all of the evidence here and all of the circumstances in the case and then determine whether or not the bank had such notice as I have described to you."

71.

The court erred in charging the jury as follows:

"But if it (the defendant) had notice or knowledge, or if in the exercise of bad faith, it abstained from learning those things, when it might by the exercise of reasonable diligence and would have learned the fact that the money was placed there in pursuance of that plan of the Chemical Company to pay off certain of its directors and those who were endorsers upon its paper, then the bank could not keep the money, and could not offset it against this note and would have to pay it back to the trustee and receive its distributive share along with the other creditors, when it proved up its claim."

72.

The court erred in charging the jury that they should take into consideration particularly the knowledge that the cashier and the assistant cashier of that bank had in handling those transactions, and the collections, and any knowledge that came to them by reason of having some interest in the Chemical Company, if you find that such knowledge did come, and that they (the jury) had a right to consider all those things and then determine whether this bank had notice or knowledge of the fraud upon the part of the Chemical Company in depositing this money, for the purpose of making these preferential payments, remembering all the time that the court has determined the other question for you, as a matter of fact, that the money was deposited there with the intent on the part of the Chemical Company to defraud.

369 73.

The court erred in charging the jury as follows:

"I do not mean to say to you that you cannot consider anything—if there is any evidence of anything—that the cashier and assistant cashier learned from Mr. Tuger, or would have learned from Mr. Tuger had they exercised reasonable diligence under the rules that I have laid down here in pursuing inquiry, but you must remember that you take that under the instructions I have already laid down that they cannot be charged with fraud for not pursuing inquiry unless they acted in bad faith."

370 PROCEEDINGS IN THE SUPREME COURT OF THE STATE OF MICHIGAN.

Calendar Entries.

26641.

D. LLOYD JOHNSON, as Trustee of the St. Louis Chemical Company, a Bankrupt, Plaintiff,

vs.

GRATIOT COUNTY STATE BANK, Defendant and Appellant,

Lyon & Moinet, George P. Stone, L. B. McArthur.

Error to Gratiot.

Searl, J.

1915.
Feb. 10. Praecipe filed and writ issued ret. March 2, 1915.
Feb. 15. Proof of notice of writ filed.
Apr. 7. Return filed.
Apr. 27. Note of argument filed.

June 2. Stipulation of continuance filed.
Aug. 14. Note of argument filed.
Nov. 27. Note of argument filed.
1916.
Jan. 13. Stipulation of continuance filed.
Feb. 28. Note of argument filed.
Apr. 1. Motion for continuance filed.
Apr. 3. Letter in opposition filed.
Apr. 4. Motion denied.
Order entered.
371
1916.
Apr. 20. Argued and submitted.
Dec. 21. Affirmed with costs.
1917.
Jan. 11. Remittitur to Court below.
Feb. 26. Appellee's costs taxed at $70.80.
Fi. Fa. issued ret. March 19, 1917.
1-421.
1-421.
1-449.
1-638.

Order Denying Continuance.

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court-room, in the Capitol, in the City of Lansing, on the Fourth Day of April, in the Year of Our Lord One Thousand Nine Hundred and Sixteen.

Present: The Honorable John W. Stone, Chief Justice; Franz C. Kuhn, Russell C. Ostrander, John E. Bird, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Rollin H. Person, Associate Justices.

26641.

D. Lloyd Johnson, Trustee, Plaintiff,

vs.

Gratiot County State Bank, Defendant and Appellant.

In this cause defendant having entered a motion for continuance for failure of plaintiff to file printed records in accordance with the rules of this Court, and plaintiff having filed opposition to said motion, upon due consideration thereof by the Court, said motion for continuance is denied.

372 *Judgment.*

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court-room, in the Capitol, in the City of Lansing, on the Twenty-first Day of December, in the Year of Our Lord One Thousand Nine Hundred and Sixteen.

Present: The Honorable John W. Stone, Chief Justice; Franz C. Kuhn, Russell C. Ostrander, John E. Bird, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Rollin H. Person, Associate Justices.

26641.

D. LLOYD JOHNSON, Trustee St. Louis Chemical Company, a Bankrupt, Plaintiff,

vs.

GRATIOT COUNTY STATE BANK, Defendant and Appellant.

The record and proceedings in this cause having been removed to this court by Writ of Error issued to the Circuit Court for the County of Gratiot, and the same, and the matters in error assigned having been seen and inspected and duly considered by the Court and it appearing to this Court that in said record and proceedings and in the giving of judgment in said Circuit Court there is no error, therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Gratiot be and the same is hereby in all things affirmed, and that the plaintiff do recover of the defendant his costs, to be taxed, and that he have execution therefor.

373 STATE OF MICHIGAN:

Supreme Court.

D. LLOYD JOHNSON, as Trustee of the St. Louis Chemical Company, Bankrupt, Appellee,

vs.

GRATIOT COUNTY STATE BANK, a Corporation, Appellant.

Error to Gratiot Circuit Court.

Hon. Kelly S. Searl, Circuit Judge.

Opinion.

(Filed December 21, 1916.)

1. Bankruptcy—Preference—Recovery.

Bankr. Act July 1, 1898, c. 541 §68*a*, 30 Stat. 565 (U. S. Comp. St. 1913, §9652), provides that in all cases of mutual credits between the estate of a bankrupt and a creditor the account shall be stated and that one debt shall be set off against the other and the balance only should be allowed and paid, while section 60*b* (section 9644) declares that, if a bankrupt shall have made a transfer of any of his property within four months before the filing of the petition in bank-

ruptcy or after the filing thereof and before an adjudication and the transfer operates as a preference, it may be set aside by his trustee.

374 The trustee of a bankrupt corporation contended that the corporation in contemplation of insolvency made deposits with defendant bank to which it was indebted, intending that the bank should apply such deposits to the indebtedness and thus obtain a preference. Held that, if the deposits were so made, the amount thereof might be recovered on the ground of preference, though the bank was entitled to set off the amount of the deposits against its debt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§250, 251; Dec. Dig.]

2. Bankruptcy—Adjudication—Effect of.

An adjudication in involuntary bankruptcy, where the proceedings were contested that the alleged bankrupt was insolvent and had made preferential payments, are conclusive as to creditors being treated as proceedings in rem and cannot be collaterally attacked.

[Ed. Note.—For other cases, see Bankruptcy; Cent. Dig. §§60, 142, 143; Dec. Dig.]

3. Appeal and Error—Review—Harmless Error.

In a suit to recover alleged preferential payments made by the bankrupt, defendant cannot complain that the record of the bankruptcy proceedings was read before the jury, where the court charged that certain matters were determined by the record and that it should not be considered by the jury otherwise than as directed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §4179; Dec. Dig. Trial, Cent. Dig. §977.]

4. Bankruptcy—Action to Recover Preferences—Evidence—Admissibility.

In a suit by the trustee of a bankrupt to recover an alleged preference, where the schedules of the bankrupt were not offered on the question of solvency, the rejection of evidence that the assets of the bankrupt were reduced because of a cyclone which passed over its plant a few months prior to adjudication, was not erroneous; the question of solvency having been concluded by the adjudication in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§460, 461; Dec. Dig.]

Error to Circuit Court, Gratiot County; Kelly S. Searl, Judge.

Action by D. Lloyd Johnson, trustee of the St. Louis Chemical Company, bankrupt, against the Gratiot County State Bank. There was a judgment for plaintiff, and defendant brings error. Affirmed.

375 Argued before Stone, C. J., and Kuhn, Ostrander, Bird, Moore, Steere, Brooke, and Person, JJ.

Geo. P. Stone, of Ithaca, and L. B. McArthur, of Lansing, for appellant. Lyon & Molnet, of St. Johns (William A. Bahlke, of Alma, of counsel), for appellee.

BIRD, *J.*:

A petition was filed in the federal court on the 25th day of June, 1909, against the St. Louis Chemical Company, by certain of its creditors, praying to have it adjudged a bankrupt. Subsequently the company was adjudged a bankrupt and a trustee appointed. The company became indebted to defendant bank on a promissory note for $5,000, in July, 1907, and the same was renewed from time to time until February 5, 1909, when the company commenced to make payments thereon. From that date up to March 31, 1909, it made several payments aggregating $1,300. It is to recover this sum that the trustee filed this suit, it being his claim that the payments were made within four months of the bankruptcy proceedings and while the company was insolvent.

[1] 1. The principal error relied upon by the bank was the court's refusal to instruct the jury that under the proofs defendant had a right to set off the amount due on its note against the chemical company's deposit.

It was the claim of defendant that deposits were made by the company in its bank from time to time, in the usual course of business, and that by reason thereof the relation of debtor and creditor existed, and that after the note became due it had a lawful right under the law to set it off against the deposit, and it is contended that the bankruptcy laws, in express terms, authorized this to be done. The particular section referred to is section 68*a* of the Bankruptcy Law, and it provides in part that:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

Plaintiff, in answer to this contention, concedes that, if the relation existing between defendant and the company had been the ordinary relation existing between banker and depositor, its conclusion would be sound. But it is the contention of plaintiff that the deposits made in defendant bank and the checks drawn thereon in payment of defendant's note were done in pursuance of a
376 fraudulent scheme on the part of the directors of the company, after they knew the company was insolvent, to convert its quick assets into money and pay off, before the crash came, certain notes, including the one in question, which had been indorsed by two of the directors of the company; that the carrying out of this scheme within four months from the date of the bankruptcy proceedings, and while the company was insolvent, created an unlawful

preference in behalf of the bank and was in fraud of its other creditors. It was further claimed that the defendant had notice that the company was insolvent and had knowledge of the unlawful scheme when the payments were made.

If it can be said that these claims were supported by competent proof, the trial court was justified in disposing of the matter as he did. The jury were instructed in part that:

"Now, when the money was placed in the bank, the bank would owe the money to the chemical company. The chemical company owed a note to the bank. If the bank received this money in good faith and without knowledge, such knowledge as I have defined to you in my charge here, of the fraudulent intent upon the part of the Chemical Company, then it would have the right to offset its note against the money so deposited, and, if the payment were received by the checks for the purpose of making payments upon the note, the bank, under those circumstances, could keep the money. But if it had notice or knowledge, or if in the exercise of bad faith it abstained from learning those things, when it might, by the exercise of reasonable diligence, and would have learned the fact that the money was placed there in pursuance of that plan of the chemical company to pay off certain of its directors and those who were indorsers upon its paper, then the bank could not keep the money and could not offset it against this note, and would have to pay it back to the trustee and receives its distributive share along with the other directors when it proved up its claims."

The testimony tended to show that the directors were indorsers on notes to several banks, and, when it became obvious that the company could not weather the storm, they arranged to realize on the quick assets of the company and pay off these notes, and that during the time they were making these payments the company was insolvent. Testimony was admitted tending to show that notice
377 of these facts was brought home to the defendant. If the jury believes this testimony, the defendant was not entitled to retain the payments because they were received in violation of the provision of the bankruptcy law against preferences. Section 60*b* of the Bankruptcy Law.

[2] 2. But it is strenuously insisted that there was no competent evidence to establish the fact that the company was insolvent for four months prior to the date of the filing of the petition, and that the directors had knowledge of it. To establish these facts the bankruptcy proceedings were received in evidence. The petition charged that the company was insolvent and had been for four months prior thereto, and that it had created preferences in behalf of certain of its creditors, by making payments on the note heretofore referred to, including the one in question. The sworn answer denied these allegations. A hearing was had. The referee found the allegations to be established, and the district court later confirmed the finding. The trial court held, and so charged the jury, that the bankruptcy proceedings were conclusive as to those facts.

Defendant insists that the adjudication settled nothing beyond the fact of insolvency of the company at the date of the filing of the

petition. The rule appears to be otherwise where the proceedings are involuntary and are contested. In such cases the finding of the referee, when confirmed by the court, is final and conclusive in any collateral inquiry and is binding on the creditors whether they appear or not. This appears to be placed upon the ground that the proceedings are in a sense in rem, and the law makes all creditors parties to the proceedings. Bear vs. Chase, 99 Fed. 920, 40 C. C. A. 182; In re American Brewing Co., 112 Fed. 752, 50 C. C. A. 517; Hackney vs. Hargraves, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675; In re Hecox, 164 Fed. 823, 90 C. C. A. 627; Cook vs. Robinson, 194 Fed. 785, 114 C. C. A. 505.

In the last-named case it was said:

"Now, the creditors of the bankrupt became parties to the proceedings to have him so adjudged and are precluded by the order of adjudication in so far at least as the adjudication determines the insolvency of the debtor, and that he has committed an act of bankruptcy within four months of the filing of the petition. In Bear vs. Chase, 99 Fed. 920, 924, 40 C. C. A. 182, 186, a case bearing near analogy upon the facts to the case at bar, the Circuit Court of Appeals for the Fourth Circuit expressly held that: 'Upon the
378 adjudication of the bankrupt, all creditors became parties to the bankruptcy proceedings by operation of law, and particularly these creditors by whose acts the bankruptcy was caused.' Here, as there, the person running the attachment is a creditor of the bankrupt, and it was he who through the attachment precipitated the proceeding in bankruptcy. So in Hackney vs. Hargreaves Bros., 13 Am. Bankr. Rep. 164, 170, 68 Neb. 624 [94 N. W. 822] 99 N. W. 675, which was a contest between a trustee in bankruptcy and one sought to be charged as a creditor having received unlawful preference, the court gave a like rendering of the law, as follows: 'the defendants in the action are not third parties in the sense that they are in no wise connected with the bankruptcy proceedings, because, for the purpose of these controversies and in determining their liability, they are sought to be charged as creditors of the bankrupt having received unlawful preferences, and for such purposes were necessarily parties to the bankruptcy proceedings.'"

Again in Re Hecox, supra, the court observed that:

"The radical error in the ruling of the District Court and the vice in the position assumed by counsel for the receiver before this court consist in undertaking collaterally to controvert the ground of adjudication in bankruptcy. That adjudication determined that the bankrupt was insolvent and while insolvent, within four months of the filing of the petition in involuntary bankruptcy, and because of its insolvency, a receiver had been put in charge of its property by order of the state court. By the amendment to the Bankrupt Act of July 1st, 1898, c. 541, §3*a* (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), by Act Feb. 5th, 1903, c. 487, §2, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025), it is declared to be an act of bankruptcy 'because of insolvency a receiver or trustee have been put in charge of its property under the laws of a state, a territory, or of the United States.' Until avoided in a direct proceeding therefore, that

adjudication was binding and conclusive on the bankrupt and creditors, as much so as a judgment, inter partes, on due hearing in a court of competent jurisdiction. In re American Brewing Company, 112 Fed. 752, 50 C. C. A. 517; In re Knight (D. C.) 125 Fed. 35; In re First National Bank, 152 Fed. 65, 81 C. C. A. 260 [11 Ann. Cas. 355]."

We think the weight of authority sustains the contention of plaintiff's counsel and the position of the court that the bankruptcy
379 proceedings were conclusive in these proceedings upon the questions of the insolvency of the company on the date of filing its petition and for four months prior thereto, and that the directors had knowledge thereof.

[3] 3. The plaintiff was permitted against objection to read the bankruptcy proceedings in the presence of the jury. It is contended that this was harmful to defendant on the issue which was submitted to the jury. The bankruptcy proceedings were admissible to furnish a basis for the charge of the court that on the day of the filing of the petition the company was insolvent and had been so for four months prior thereto, and that the directors had knowledge thereof. These were material things for the plaintiff to show. We do not, however, see what necessity there was for reading them into the record in the presence of the jury. If it resulted in any harm to defendant's case, we think it was cured by the following explanation of the court:

"Certain issues of this case that the court was obliged to receive testimony upon, and a large amount of documentary testimony of what took place in the United States Court, was offered and received by the court, but now at the conclusion of the case, I determine some of those questions for you, and you need not consider any of the documentary evidence so far as it came from the case in the United States court except as I shall permit you to do so later on in this charge."

[4] 4. 'After the schedules annexed to the petition had been received in evidence showing the assets of the company, the defendant offered testimony tending to show that the assets were materially reduced as the result of a cyclone which passed over the company's plant a few months prior to the adjudication. The court rejected this testimony on the ground that the insolvency of the company was foreclosed by the bankruptcy proceedings. Counsel bases his argument on the assumption that the schedules were admitted on the question of solvency. In this he is in error, as counsel for plaintiff stated at the time that they were not offered on the question of solvency, as it was his contention that that question was determined conclusively by the bankruptcy proceedings.

The case seems to have been properly submitted to the jury, and their finding is supported by the testimony.

We are of the opinion that the judgment should be affirmed.

380 STATE OF MICHIGAN, *ss:*

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of the

record and proceedings in the foregoing entitled cause removed to said court by Writ of Error issued to the Circuit Court for the County of Gratiot and of the record and proceedings in said cause in said Supreme Court, including the final judgment of said Supreme Court in said cause, entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this fifth day of March, in the year of our Lord one thousand nine hundred and seventeen.

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,
Clerk Supreme Court of Michigan.

381 *Memorandum of Submission.*

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twentieth day of April, in the year of our Lord one thousand nine hundred and sixteen.

Present, the Honorable John W. Stone, Chief Justice; Franz C. Kuhn, Russell C. Ostrander, John E. Bird, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Rollin H. Person, Associates Justices.

26641.

D. LLOYD JOHNSON, Trustee,

vs.

GRATIOT COUNTY STATE BANK.

This cause coming on to be heard is argued by Mr. Lyon for plaintiff and by Mr. McArthur for defendant and duly submitted.

Supreme Court of the United States

GRATIOT COUNTY STATE BANK,
a Corporation,

Petitioner,

vs.

D. LLOYD JOHNSON,
as Trustee of the St. Louis Chemical
Company, Bankrupt.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

To the Honorable the Supreme Court of the United States:

The petition of Gratiot County State Bank, a banking corporation, organized and existing under the laws of the State of Michigan, respectfully shows to this Honorable Court:

This controversy arises under the Bankruptcy Laws of the United States.

The action was by the Trustee in Bankruptcy for the recovery back of certain payments received by Petitioner (defendant in the action) from the Bankrupt within four months of the adjudication. The ground upon which the right to recover back was predicated was that the payments were preferences; that they were so intended by the Bankrupt and that Petitioner had reasonable cause to believe that they would effect a preference to Petitioner.

The judgment sought to be reviewed awarded a recovery back of all such payments.

Two questions of law are presented, namely:

> ***First.*** **Was the adjudication in bankruptcy—the act of bankruptcy being preferential payments while insolvent—a conclusive determination *as to all creditors* that the Bankrupt was insolvent *for the full period of four months* prior to the filing of the petition in bankruptcy?**

Petitioner was not a party to the proceedings for the adjudication in bankruptcy; was not one of the petitioning creditors; did not appear or intervene; took no part whatever in the proceeding; and in fact it does not appear that Petitioner had any notice of the pendency of the proceeding. The act of bankruptcy alleged was that the Chemical Company had transferred, while insolvent, a portion of its property to one or more of its creditors with the intent to prefer such creditors over its other creditors. (Rec. 306 and 307.) The creditors to which such preferences were alleged in the petition to have been given were eight in number. Petitioner was one of them; but the report of the Special Master to whom the issues raised by the petition and answer were referred, does not mention Petitioner. (Rec. 322-328.) The other seven creditors named in the petition are mentioned in the report. (Rec. 323.) The report states that the petition "alleges the payment of preferences within four months of the filing of the petition to various parties, these parties so receiving alleged preferences" (Rec. 322 and 323); then follow the names of the seven creditors mentioned in the petition other than the petitioner here.

The findings of the Special Master set forth in the report are:

> "On June 25, 1969, when the petition was filed, and for four months or more prior thereto, the St. Louis Chemical Company was insolvent and was *known by its directors to be insolvent.* During such four months period the corporation paid out the moneys alleged in the petitioning creditors' petition and those payments were preferences within the meaning of the Acts of Congress relating to bankruptcy." (Rec. 328.)

The findings were confirmed by the Court and an adjudication in bankruptcy made. (Rec. 329.)

The trial court in the action here sought to be reviewed held the findings upon the question of insolvency to be *res adjudicata* as to all the world, including Petitioner herein. Upon the trial Petitioner (defendant there) was not permitted to introduce evidence as to the insolvency of the debtor at the time the payments sought to be recovered back were made. All offers of such evidence were excluded.

Exceptions and Rulings, Rec. 55-61; 74 and other pages;
Assignments of Error 15, 16, 17, 19, 20, 29, 32, Rec. 359-361.

Not only was Petitioner (defendant there) not permitted to litigate the question of solvency at the time the payments were made, but in litigating the question whether Petitioner had reasonable cause to believe that the payment would effect a preference, Petitioner was compelled to confine its proofs to the very narrow limits of whether —the insolvency of the debtor being established—Petitioner had reasonable cause to believe that a preference would be effected by the payments. (See, particularly, Rec. 54 and 74.) In other words, Petitioner was not permitted to offer evidence as to the financial condition of the debtor at the time the payments were made, which it would seem very obvious would have a most important bearing upon determining whether Petitioner had reasonable cause to believe that a preference would be effected by the payments. If the financial condition of the debtor were very close to the line between solvency and insolvency, or if it was substantially the same as it had been for some months or years, much stronger facts and circumstances would be required to give the creditor "reasonable cause to believe" than if the debtor had experienced a sudden and notorious change in its financial condition. Nevertheless, Petitioner was compelled to confine its proofs to whether—the insolvency of the debtor being established—Petitioner had reasonable cause to believe that the payments would effect a preference.

Charge of the Court, Rec. 294-296.

The ruling of the trial court was affirmed by the State Supreme Court, which in so doing said:

> "We think the weight of authority sustains the contention of Plaintiff's counsel and the position of the Court that the bankruptcy proceedings were conclusive in these proceedings upon the question of the insolvency of the Company on the date of filing its petition and for four months prior thereto, and that the directors had knowledge thereof." (Rec. 378.)

It is to be noted that in so determining, the State Supreme Court considered that it was choosing between conflicting authorities and following the weight of authority.

The other question of law presented by this application is:

> ***Second.*** **Was there any evidence to be submitted to the jury upon the question whether Petitioner (defendant there) had *reasonable cause to believe* that the payments made by the debtor would effect a preference.**

A mortgage upon the lands, buildings, machinery and equipment of the Company had been given a few years earlier by the predecessor in ownership to secure an authorized issue of $100,000 of bonds. Of these bonds $56,000 had been sold and disposed of. The remainder ($44,000) had been pledged in parcels to various banks and others as collateral security for ertain notes next mentioned. Upon the organization of the Bankrupt Company —the reorganization of the business—in 1907, each of the ten Directors had raised $2,500 for the Company as working capital, making an aggregate of $25,000 so raised. (Rec. 127.) These sums were raised by giving notes of the Company endorsed or guaranteed by each Director to the extent of $25 00, and by pledging bonds as aforesaid. Petitioner had taken one of these notes for $5,000, guaranteed by two Directors and further secured by $9,000 of bonds. It is payments upon this note that are in question in this proceeding. In the latter part of 1908 the Directors of the Chemical Company informally agreed or arranged among themselves that the materials on hand

should be worked up into manufactured product and sold and the buildings and accounts receivable collected and converted into cash and the proceeds used to pay off, first, the notes of the Company which had been guaranteed or endorsed by the Directors or for which the Directors were in any other manner responsible, and second, the general unsecured creditors. (Rec. 133-138.) Payments in pursuance of this arrangement were begun in February, 1909, and continued until Petitioner's note—in common with all others of the $25,000 of notes, except one for $2,500—had been paid in full. (Rec. 52, 62, 68-86.)

While there was testimony that the Directors, at the time the arrangement was made, thought they could pay all the indebtedness (Rec. 149), as before pointed out in this petition, the adjudication in bankruptcy was in this action held to be conclusive that the Company was insolvent at the time the payments were made, and known to be so by the Directors.

The President, Vice-President, Cashier and Assistant Cashier of the Petitioner were sworn as witnesses. The Vice-President (Henry J. Tuger) was also a Director of the Bankrupt and knew of the arrangement to pay off the notes. One of the guarantors of the note held by Petitioner—D. E. Harrison—was Vice-President of the Bankrupt and was a member of the Examining Committee of Petitioner. The knowledge which Mr. Tuger and Mr. Harrison—or either of them—had as to the financial condition of the Chemical Company or the arrangement to pay off the notes, was held not to be imputed to Petitioner because of the adversary relation of these men in the particular transaction. Mr. Tuger had also obtained his $2,500 from Petitioner, but did so by giving his own note. There was no evidence that the knowledge of either of these men was communicated to any other officer or representative of the Bank. The Cashier testified on cross examination, over the objection of attorneys for Petitioner, that if he had inquired of either of these men he undoubtedly would have learned the precise condition, but that he did not inquire. (Rec. 258 and 259.) The Cashier testified on direct examination that he knew nothing as to any weakened financial condition of the Chemical Company; had no knowledge whatever that they were insolvent and

no knowledge or notice that their condition was any different than it had been during the previous year; that he had no knowledge that there were other notes in other banks which had been endorsed by the Directors of the Chemical Company. (Rec. 246.) The President and Cashier were stockholders of the Chemical Company; but it does not appear that they had any knowledge as to the financial condition of the Company or the arrangement to pay off the notes.

The payments made upon all the notes were by check upon Petitioner. That is, the Chemical Company carried its deposit account with Petitioner and as those funds came to it deposited them in this account. The Assistant Cashier testified that he knew other notes were being paid by checks drawn upon this account. (Rec. 51.)

During the time the payments were being made a number of drafts drawn on the Chemical Company and three of its notes which came to Petitioner for collection were refused payments. The most of them were for comparatively small amounts. (Rec. 46-50.) A considerable number of drafts of large amounts, with bills of lading attached, were drawn upon the Chemical Company and paid by it through Petitioner. (Rec. 110 and 111; 192 and 193; 196 and 198.) The President of Petitioner testified that about one-half of the collections against business men of St. Louis who were financially responsible that came through Petitioner for collection between July 1, 1908, and July 1, 1909, were refused and returned, and also that it is a usual custom for outside creditors to draw through Petitioner upon reputable business men of St. Louis for shipments with bill of lading attached. (Rec. 233.) The Cashier testified that business houses of St. Louis which were financially responsible frequently refused drafts that were drawn upon them for collection. (Rec. 247.) In two instances the Chemical Company made two payments on one note on the same day. The President, however, testified that the collection or bill register of Petitioner showed fourteen instances from November, 1908, to April, 1909, of more than one payment upon a note on the same day. That is, these were instances where other makers of notes had done the same thing as the Chemical Company. (Rec. 244.)

The President, the Cashier and the Assistant Cashier all testified positively that they had no knowledge or notice that there was anything wrong with the Chemical Company or any plan to pay off the guaranteed notes first. (Rec. 243, 246, 247 and 249.)

The financial responsibility of the guarantors was so great and so well-known to Petitioner that the ability of the Chemical Company to pay was really of no consequence and given no particular attention. (Rec. 257 and 266.)

The charge of the trial court upon the question of "reasonable cause to believe" is on pages 294 to 297.

Your Petitioner herein has no right of appeal to or writ of error from this Honorable Court, because the title, right, privilege or immunity set up by Petitioner is claimed under a statute of the United States, namely, The Act relating to Bankruptcies.

Your Petitioner presents herewith, as a part of this petition, a brief showing more fully its views upon the questions involved, and a transcript of the record in the Supreme Court of the State of Michigan.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Michigan, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Michigan in this cause, which was entitled in that court. "D. Lloyd Johnson, as Trustee of the St. Louis Chemical Company, Bankrupt, Plaintiff and Appellee, vs. Gratiot County State Bank, a Corporation, Defendant and Appellant." to the end that said cause may be reviewed and determined, and that your Petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and that the said Judgment of the said Supreme Court of the State of Michigan may be reversed.

William L. Carpenter,
Attorney for Gratiot County State Bank.

BRIEF.

POINT I.

On the first question but little in addition to the statement of facts is required. It is important, however, in this connection to note that while the petition alleged that payment of the claim in controversy was an act of bankruptcy, nevertheless the record does not show that any evidence was introduced with reference to this payment, and the finding of the Referee adjudicating the St. Louis Chemical Company a bankrupt refers specifically to and finds specifically that the other matters complained as acts of bankruptcy were established, but makes no reference whatsoever to the payment of Petitioner's claim. It is further important in this consideration that Petitioner's position at the time of the filing of the involuntary petition in bankruptcy was not that it was a creditor, but that its claim had been paid in full; so that it then held no outstanding obligation of the St. Louis Chemical Company.

In holding that the adjudication in bankruptcy conclusively established, as against Petitioner, the insolvency of the St. Louis Chemical Company at the time of the payments to Petitioner, the Michigan Supreme Court relied upon the following cases:

Bear vs. Chase, 99 Fed. 920; 40 C. C. A. 182;
In re American Brewing Co., 112 Fed. 762; 50 C. C. A. 517;
Hackney vs. Hargraves, 68 Neb. 624; 94 N. W. 822, 99 N. W. 675;
In re Hecox, 164 Fed. 823; 90 C. C. A. 627;
Cook vs. Robinson, 194 Fed. 785, 114 C. C. A. 505.

The majority of these are not in point.

Bear vs. Chase, supra.

This case merely held that where an involuntary petition alleged that the debtor had suffered creditors to obtain a preference through levy on attachment writs, the

Court of Bankruptcy by order to show cause served upon attaching creditors—and to which they answered—might restrain them from further prosecuting the actions upon which the attachments were issued. This was before any adjudication in bankruptcy had been made.

Re American Brewing Co., supra.

In this case Magnus' Sons—the parties claimed to be concluded by the adjudication—had appeared in the proceedings prior to the adjudication.

Hackney vs. Hargraves, supra.

This case is no wise in point. The holding was that the schedules of a bankrupt showing his liabilities are "admissible not *as conclusive* of the alleged insolvency, but as *tending to prove that issue.* The Court in its opinion also said that "An adjudication of bankruptcy is manifestly *admissible in evidence* for the purpose of establishing the fact of insolvency." There is nowhere in this case any holding that the adjudication is conclusive, but, on the contrary that it is only evidence of insolvency.

In the cases of *In re Hecox* and *Cook vs. Robinson*, both supra, the party as to whom an adjudication was held conclusive was a creditor whose preference consisted merely in the attachment of goods for the satisfaction of his claim or judgment obtained thereon. In neither case had the claim been paid; so that the parties still appeared as creditors of the bankrupt.

This Court established the rule as to the effect of an order adjudicating a person or corporation a bankrupt in the case of

Manson vs. Williams, 213 U. S. 453; 53 L. Ed. 869; 29 Sup. Ct. 519; 22 Am. B. R. 22.

One Henry Hudson had purchased a stock of goods and placed his brother James in the store in charge of the sale of them, the business being carried on as The Hudson Clothing Company. Henry was adjudicated a bankrupt, and later an involuntary petition was filed against both Henry and his brother James as partners doing business as The Hudson Clothing Company. The Trustee of Henry

filed a denial and answer, but an adjudication was, nevertheless, made without a hearing being given to the Trustee of Henry Hudson. It was claimed that in a suit for possession of the stock of goods used in the business of The Hudson Clothing Company the Trustee of Henry Hudson was barred and concluded by the adjudication as to the Clothing Company. This contention was denied by this Court, and through Justice Holmes the following rule was laid down:

> "The principle of law is plain. The adjudication put the two brothers into bankruptcy for the purpose of administering whatever property there might be as against the world, but it did not establish the facts upon which it was founded, no matter how necessary the connection, except as against parties entitled to be heard. *Tilt vs. Kelsey*, 207 U. S. 43, 52."

And previously, in *Tilt vs. Kelsey*, relied upon, as shown in *Manson vs. Williams*, this Court declared the effect of a judgment of this nature as a proceeding in rem.

> "Nor is it true that a judgment because conclusive on all the world in what we may call its legislative effect, is equally conclusive upon all as an adjudication of the facts upon which it is grounded."

See, also,

In re McCrumm, 214 Fed. 207; 130 C. C. A. 555; 32 Am. B. R. 604;

Silver vs. Tift, 123 Ga. 804; 51 S. E. 748; 1 L. R. A.—n. s.—386; 17 Am. B. R. 9.

The Michigan Supreme Court, after citing the cases, upon which it relied, bearing on this point, said:

> "We think the weight of authority sustains the contention * * * that the bankruptcy proceedings were conclusive in these proceedings upon the question of the insolvency of the Company, etc."

While, in our opinion, the weight of authority is against the position taken by the Michigan Supreme Court, we must admit that there is a conflict, particularly if the opinions rather than the decisions of certain cases are

considered as in support of the doctrine that the adjudication is conclusive of the question of insolvency. The matter is an important one, and one that does and will arise frequently in the administration of the Bankruptcy Act. We submit, therefore, that the matter should be firmly settled by the decision of this Court.

POINT II.

The proper meaning of the term "reasonable cause to believe" is best stated in

Grant vs. National Bank, 97 U. S. 80,

where it is said at page 81,

> "Some confusion exists in the cases as to the meaning of the phrase 'having reasonable cause to believe such a person is insolvent.' *Dicta* are not wanting which assume that it has the same meaning as if it had read 'having reasonable cause to suspect such a person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor have some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances and yet have no cause for a well grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it,—and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue

to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose."

The question was also before the court in:

Stuky vs. Masonic Savings Bank, 108 U. S. 74.

See also,

Rosenman vs. Coppard, 228 Fed. 114, Circuit Court of App. 5th Circuit.

The question has also been before Circuit Courts of Appeals, 5th Circuit, in

Tumlin vs. Bryan, 165 Fed. 166,

where it is stated at page 169,

"Reasonable cause to believe that a preference was intended cannot be held to be proved by circumstances that would merely excite suspicion. And circumstances may seem suspicious after the bankruptcy occurs that would not appear unusual at the time of their occurrence, and would then have presented no 'reasonable cause' on which to found a belief of intended preference. Merchants and other business men constantly continue to make payments up to the very eve of failure and it would be disastrous to have them set aside on slight proof or mere suspicion."

And before the Circuit Court of Appeals of the 8th Circuit in

Paper vs. Stern, 198 Fed. 642,

where it is said at page 645,

"Suspicion, fear, and facts that arouse suspicion and fear in the mind of the creditor, or party to be benefited, but give no reasonable ground for him to believe that a preference is intended by the transfer, do not make such a preference voidable."

See also,

Powell vs. Gate City Bank, 178 Fed. 609, Circuit Court of App. 8th Circuit.

The testimony and other showing in the record which is set forth in the foregoing petition, are not evidence that petitioner had reasonable cause to believe that the payments would effect a preference. **The most that can be said is that suspicion or fear might have been aroused. But neither was aroused in Petitioner because of the great and known financial responsibility of the guarantors—what the Chemical Company did being in fact immaterial to Petitioner.**

It is respectfully submitted that prejudicial error was committed by the state Courts, both the trial Court and the Supreme Court, in holding that,

(a) the adjudication in bankruptcy was binding upon petitioner (defendant there) as to the question of insolvency at the time the payments were made, and

(b) there was evidence to go to the jury upon the question whether petitioner had reasonable cause to believe the payments would effect a preference.

William L. Carpenter,
Thomas G. Long,
George P. Stone,

Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

GRATIOT COUNTY STATE BANK,
Petitioner,

vs.

D. LLOYD JOHNSON, as Trustee of the St. Louis Chemical Company,
Respondent.

BRIEF FOR PETITIONER.

STATEMENT OF CASE.

This controversy arises under the Bankruptcy Law of the United States. The action was by the Trustee in Bankruptcy for the recovery back of certain payments made by the bankrupt to Petitioner within the four months before it was adjudicated to be a bankrupt, upon the ground that such payments constituted an unlawful preference. The judgment sought to be reviewed awarded a recovery back of all such payments. Petitioner was the bankrupt's banker and the payments in question were made by checks drawn by the bankrupt against its account in Petitioner's bank.

As stated in our petition for the writ, two questions are presented:

I. Was the adjudication in bankruptcy—the act of bankruptcy being preferential payments while insolvent—a conclusive determination *as to all creditors* that the bankrupt was insolvent *for the full period of four months* prior to the filing of the petition in bankruptcy?

II. Was there any evidence to be submitted to the jury upon the question whether Petitioner (defendant there) had *reasonable cause to believe* that the payments made by the debtor would effect a preference?

We will discuss these questions separately.

I.

Was the adjudication in bankruptcy—the act of bankruptcy being preferential payments while insolvent—a conclusive determination AS TO ALL CREDITORS that the bankrupt was insolvent FOR THE FULL PERIOD OF FOUR MONTHS prior to the filing of the petition in bankruptcy?

Petitioner was not a party to the proceedings for the adjudication in bankruptcy; was not one of the petitioning creditors; did not appear or intervene; took no part whatever in the proceeding; and in fact it does not appear that Petitioner had any notice of the pendency of the proceeding. The act of bankruptcy alleged was that the Chemical Company had transferred, while insolvent, a portion of its property to one or more of its creditors with the intent to prefer such creditors over its other creditors (R. 186, 187). The creditors to whom such preferences were alleged in the petition to have been given were eight in number. Petitioner was one of them; but the report of the Special Master to whom the issues raised by the petition and answer were referred does not mention petitioner (R. 197-

201). The other seven creditors named in the petition are mentioned in the report (R. 197). The report states that the petition

> "alleges the payment of preferences within four months of the filing of the petition to various parties, these parties so receiving alleged preferences" (R. 197),;

then follow the names of the seven creditors mentioned in the petition other than the Petitioner here.

The findings of the Special Master set forth in the report are:

> "On June 25, 1909, when the petition was filed, and for four months or more prior thereto, the St. Louis Chemical Company was insolvent and was *known by its directors to be insolvent.* During such four months period the corporation paid out the moneys alleged in the petitioning creditors' petition and those payments were preferences within the meaning of the Acts of Congress relating to bankruptcy" (R. 201).

The findings were confirmed by the Court and an adjudication in bankruptcy made (R. 201).

The trial court in the action here sought to be reviewed held the findings upon the question of insolvency to be *res adjudicata* as to all the world, including Petitioner herein. Upon the trial, Petitioner (defendant there) was not permitted to introduce evidence as to the solvency of the debtor at the time the payments sought to be recovered back were made. All offers of such evidence were excluded.

Exceptions and Rulings, Rec. 55-61, 74 and other pages;

Assignments of Error 15, 16, 17, 19, 20, 29, 32, Rec. 222-224.

Not only was Petitioner (defendant there) not permitted to litigate the question of solvency at the time the payments were made, but in litigating the question whether Petitioner had reasonable cause to believe that the payment would effect a preference, Petitioner was compelled to confine its proofs to the very narrow limits of whether—the insolvency of the debtor being established—Petitioner had reasonable cause to believe that a preference would be effected by the payments. (See, particularly, Record 32 and 45.) In other words, Petitioner was not permitted to offer evidence as to the financial condition of the debtor at the time the payments were made, which it would seem very obvious would have a most important bearing upon determining whether Petitioner had reasonable cause to believe that a preference would be effected by the payments. If the financial condition of the debtor were very close to the line between solvency and insolvency, or if it was substantially the same as it had been for some months or years, much stronger facts and circumstances would be required to give the creditor "reasonable cause to believe" than if the debtor had experienced a sudden and notorious change in its financial condition. Nevertheless, Petitioner was compelled to confine its proofs to whether—the insolvency of the debtor being established—Petitioner had reasonable cause to believe that the payments would effect a preference.

Charge of Court, Rec. 179-180.

The ruling of the trial court was affirmed by the State Supreme Court, which in so doing said:

> "We think the weight of authority sustains the contention of plaintiff's counsel and the position of the Court that the bankruptcy proceedings were conclusive in these proceedings upon the question of the insolvency of the Company on the date of fil-

ing its petition and for four months prior thereto, and that the directors had knowledge thereof." (R. 237.)

It is important also in this connection to note that while the petition alleged that payment of the claim in controversy was an act of bankruptcy, nevertheless the record does not show that any evidence was introduced with reference to this payment, and the finding of the Referee adjudicating the St. Louis Chemical Company a bankrupt refers specifically to and finds specifically that the other matters complained of as acts of bankruptcy were established, but makes no reference whatsoever to the payment of Petitioner's claim. It is further important in this connection that Petitioner's position at the time of the filing of the involuntary petition in bankruptcy was not that it was a creditor, but that its claim had been paid in full, so that it then held no outstanding obligation of the St. Louis Chemical Company.

In holding that the adjudication in bankruptcy conclusively established, as against Petitioner, the insolvency of the St. Louis Chemical Company at the time of the payments to Petitioner, the Michigan Supreme Court relied upon the following cases:

Bear vs. Chase, 99 Fed. 920; 40 C. C. A. 182;

In re American Brewing Co., 112 Fed. 762; 50 C. C. A. 517;

Hackney vs. Hargraves, 68 Neb. 624; 94 N. W. 822; 99 N. W. 675;

In re Hecox, 164 Fed. 823; 90 C. C. A. 627;

Cook vs. Robinson, 194 Fed. 785; 114 C. C. A. 505.

The majority of these are not in point.

Bear vs. Chase, supra.

This case merely held that where an involuntary petition alleged that the debtor had suffered creditors to obtain a preference through levy under attachment writs, the Court of Bankruptcy by order to show cause served upon attaching creditors—and to which they answered—might restrain them from further prosecuting the actions upon which the attachments were issued. This was before any adjudication in bankruptcy had been made.

Re American Brewing Co., supra.

In this case Magnus' Sons—the parties claimed to be concluded by the adjudication—had appeared in the proceedings prior to the adjudication.

Hackney vs. Hargraves, supra.

This case is in no wise in point. The holding was that the schedules of a bankrupt showing his liabilities are

> "admissible *not as conclusive* of the alleged insolvency, but as *tending to prove that issue.*"

The Court in its opinion also said that

> "An adjudication of bankruptcy is manifestly *admissible in evidence* for the purpose of establishing the fact of insolvency."

There is nowhere in this case any holding that the adjudication is conclusive, but, on the contrary, that it is only evidence of insolvency.

In the cases of *In re Hecox* and *Cook vs. Robinson*, both supra, the party as to whom an adjudication was held conclusive was a creditor whose preference consisted merely in the attachment of goods for the satisfaction of his claim or judgment obtained thereon. In neither case had the claim been paid; so that the parties still appeared as creditors of the bankrupt.

This Court established the rule as to the effect of an order adjudicating a person or corporation a bankrupt in the case of

Manson vs. Williams, 213 U. S. 453; 53 L. Ed. 869; 29 Sup. Ct. 519; 22 Am. B. R. 22.

One Henry Hudson had purchased a stock of goods and placed his brother James in the store in charge of the sale of them, the business being carried on as The Hudson Clothing Company. Henry was adjudicated a bankrupt, and later an involuntary petition was filed against both Henry and his brother James as partners doing business as The Hudson Clothing Company. The Trustee of Henry filed a denial and answer, but an adjudication was, nevertheless, made without a hearing being given to the Trustee of Henry Hudson. It was claimed that in a suit for possession of the stock of goods used in the business of The Hudson Clothing Company the Trustee of Henry Hudson was barred and concluded by the adjudication as to the Clothing Company. This contention was denied by this Court, and through Justice Holmes the following rule was laid down:

> "The principle of law is plain. The adjudication put the two brothers into bankruptcy for the purpose of administering whatever property there might be as against the world, but it did not establish the facts upon which it was founded, no matter how necessary the connection, except as against parties entitled to be heard. *Tilt vs. Kelsey*, 207 U. S. 43, 52."

And previously, in *Tilt vs. Kelsey*, relied upon, as shown in *Manson vs. Williams*, this court declared the effect of a judgment of this nature as a proceeding in rem.

> "Nor is it true that a judgment because conclusive on all the world in what we may call its legislative effect, is equally conclusive upon all as an

adjudication of the facts upon which it is grounded."

See, also,

In re McCrumm, 214 Fed. 207; 130 C. C. A. 555; 32 Am. B. R. 604;

Silver vs. Tift, 123 Ga. 804; 51 S. E. 748; 1 L. R. A.-N. S.-386; 17 Am. B. R. 9.

In concluding this subject we respectfully submit that the trial court and the Supreme Court of Michigan erred in deciding that the adjudication in bankruptcy was a conclusive determination as to all creditors that the bankrupt was insolvent for the full period of four months prior to the filing of the petition in bankruptcy.

II.

Was there any evidence to be submitted to the jury upon the question whether petitioner (defendant there) had REASONABLE CAUSE TO BELIEVE that the payments made by the debtor would effect a preference?

(This question was raised by our motion to direct a verdict when plaintiff concluded putting in his case (R., 134) and again when the putting in of the testimony was finally concluded (R., 169) and again in our requests to charge (R., 172 and 173). Petitioner duly excepted to these rulings and assigned error upon them.) (See Record, pp. 136, 170; Assignments of Error, 41, 44, 51, 53, 54,, pp. 225-227).

A mortgage upon the lands, buildings, machinery and equipment of the Company had been given a few years earlier by the predecessor in ownership to secure an authorized issue of $100,000 of bonds. Of these bonds $56,000 had been sold and disposed of. The remainder ($44,000)

had been pledged in parcels to various banks and others as collateral security for certain notes next mentioned. Upon the organization of the bankrupt company—the reorganization of the business—in 1907, each of the ten Directors had raised $2,500 for the Company as working capital, making an aggregate of $25,000 so raised. (R., 77.) These sums were raised by giving notes of the Company endorsed or guaranteed by each Director to the extent of $2,500, and by pledging bonds as aforesaid. Petitioner had taken one of these notes for $5,000, guaranteed by two Directors and further secured by $9,000 of bonds. This note fell due January 25, 1909. (R., 25.) (This was before any of the payments in question were made.) Soon after it became due Mr. Alger, Secretary of the bankrupt company, informed Petitioner's Cashier that they expected to pay the note in a short time and would prefer not to renew it. Petitioner assented and held the note as a past due obligation. (R. 149.) It is payments upon this note that are in question in this proceeding. In the latter part of 1908 the Directors of the Chemical Company informally agreed or arranged among themselves that the materials on hand should be worked up into manufactured product and sold and the bills and accounts receivable collected and converted into cash and the proceeds used to pay off, first the notes of the Company which had been guaranteed or endorsed by the Directors or for which the Directors were in any other manner responsible; and second, the general unsecured creditors. (R.,80-83.) Payments in pursuance of this arrangement were begun in February, 1909, and continued until Petitioner's note—in common with all others of the $25,000 of notes, except one for $2,500—had been paid in full. (R., 31, 37, 41-52, 68-86.)

While there was testimony that the Directors, at the time the arrangement was made, thought they could pay

all the indebtedness (R., 90), nevertheless, as before pointed out in this petition, the adjudication in bankruptcy was in this action held to be conclusive that the Company was insolvent at the time the payments were made, and known to be so by the Directors.

The President, Vice-President, Cashier and Assistant Cashier of Petitioner were sworn as witnesses. The Vice-President (Henry J. Tuger) was also a director of the bankrupt and knew of the arrangement to pay off the notes. One of the guarantors of the note held by Petitioner—D. E. Harrison—was Vice-President of the bankrupt and was a member of the Board of Directors and Examining Committee of Petitioner. The knowledge which Mr. Tuger and Mr. Harrison—or either of them—had as to the financial condition of the Chemical Company or the arrangement to pay off the notes, was held not to be imputed to Petitioner because of the adversary relation of these men in the particular transaction. Mr. Tuger had also obtained his $2,500 from Petitioner, but did so by giving his own note. There was no evidence that the knowledge of either of these men was communicated to any other officer or representative of the Bank, nor that either of them acted for Petitioner in any of the transactions involved in this suit. The Cashier testified on cross-examination, over the objection of attorneys for Petitioner, that if he had inquired of either of these men he undoubtedly would have learned the Bankrupt's financial condition, but that he did not inquire. (R., 156 and 157.) The Cashier testified on direct examination that he knew nothing as to any weakened financial condition of the Chemical Company; had no knowledge whatever that they were insolvent and no knowledge or notice that their condition was any different than it had been during the previous year; that he had no knowledge that there were other notes in

other banks which had been endorsed by the Directors of the Chemical Company (R., 148.) That he had no knowledge that in making these payments there was any intention on the part of the bankrupt company to effect a preference and no fact or circumstance was brought to his attention that would give him such knowledge. (R., 149.) Petitioner's President gave similar testimony. (R., 141, 142, 147.) The President and Cashier were stockholders of the Chemical Company; but it does not appear that they had any knowledge as to the financial condition of the Company or the arrangement to pay off the notes.

The payments made upon all the notes were by check upon Petitioner. That is, the Chemical Company carried its deposit account with Petitioner and as those funds came to it deposited them in this account. The Assistant Cashier testified that he knew other notes were being paid by checks drawn upon this account but he did not know "who were on the backs of the notes held by other Banks." (R., 30, 31.)

During the time the payments were being made a number of drafts drawn on the Chemical Company and three of its notes which came to Petitioner for collection were refused payment. The most of them were for comparatively small amounts. (R., 28-30.) A considerable number of drafts of large amounts, with bills of lading attached, were drawn upon the Chemical Company and paid by it through Petitioner. (R., 66 and 67; 116 and 117; 118 and 119.) The President of Petitioner testified that about one-half of the collections against business men of St. Louis who were financially responsible that came through Petitioner for collection between July 1, 1908, and July 1, 1909, were refused and returned, and also that it is

a usual custom for outside creditors to draw through Petitioner upon reputable business men of St. Louis for shipments with bill of lading attached. (R., 141.) The Cashier testified that business houses of St. Louis which were financially responsible frequently refused drafts that were drawn upon them for collection. (R., 150.) In two instances the Chemical Company made two payments on one note on the same day. The President, however, testified that the collection or bill register of Petitioner showed fourteen instances from November, 1908, to April, 1909, of more than one payment upon a note on the same day. That is, these were instances where other makers of notes had done the same thing as the Chemical Company. (R., 147.)

The President, the Cashier and the Assistant Cashier all testified positively that they had no knowledge or notice that there was anything wrong with the Chemical Company or any plan to pay off the guaranteed notes first. (R., 147, 148, 149 and 150.)

The financial responsibility of the guarantors was so great and so well-known to Petitioner that the ability of the Chemical Company to pay was really of no consequence and given no particular attention. (R., 155 and 160.)

The charge of the trial court upon the question of "reasonable cause to believe" is on pages 179 to 181. The pith of the charge is contained in the following paragraphs:

> "So you will see, gentlemen, the only question left for you to determine in this case is, was the bank chargeable under the rules I have laid down with notice of the fraudulent intent of the Chemical Company to deposit this money in the bank and make these preferential payments at the time that the money was so deposited in the bank and upon which the checks were afterwards drawn.

Now when the money was placed in the bank, the bank would owe the money to the Chemical Company. The Chemical Company owed a note to the bank. If the bank received this money in good faith and without knowledge, such knowledge as I have defined to you in my charge here, of the fraudulent intent upon the part of the Chemical Company, then it would have the right to offset its note against the money so deposited, and if the payments were received by the checks for the purpose of making payments upon the note, the bank under those circumstances could keep the money. But if it had notice or knowledge or if in the exercise of bad faith it abstained from learning those things when it might, by the exercise of reasonable diligence, and would have learned the fact that the money was placed there in pursuance of that plan of the Chemical Company to pay off certain of its directors and those who were endorsers upon its paper, then the bank could not keep the money and could not offset it against this note and would have to pay it back to the Trustee and receive its distributive share along with the other creditors when it proved up its claim.

That is the only question for you to determine in the case. In determining that question you have a right to take into consideration all of the evidence that has been offered and introduced in the case and allowed to go to you for that purpose." (R., 180 and 181.)

This instruction was approved by the State Supreme Court. (R., 234.) Under the Bankruptcy Law (Sec. 68-A) the Petitioner banker had a right to apply these deposits or to have them applied in payment of past-due paper.

See

Studley vs. Boylston Bank, 229 U. S. 523;

New York County Bank vs. Massey, 192 U. S. 138;

Continental Trust Co. vs. Chicago Title Co., 229 U. S. 435.

The only theory therefore upon which respondent could recover back these payments was that outlined in this charge. This is indicated in

Studley vs. Boylston Bank, Supra.

It is there said (see p. 529):

> "The Bankruptcy Act recognizes this right (the right of a bank to apply deposits to the payment of past-due paper) and it cannot be taken away by construction because of the possibility that it may be abused. The remedy against that evil is found in the fact that the Trustee is authorized to sue and recover if it is shown that after insolvency the money was deposited for the purpose of enabling a bank or other creditor to secure a preference."

Of course, it is to be understood in applying this language that such payment cannot be recovered unless the creditor had reasonable cause to believe that a preference would be thereby effected and this is indicated by other language in the same opinion. (See p. 526.)

We insisted in the trial court (R., 134, 170) and in the State Supreme Court, and we insist in this court, that the evidence did not warrant the court submitting this question to the jury. Both the trial court and the State Supreme Court disagreed with us, the latter saying:

> "Testimony was admitted tending to show that notice of these facts was brought home to the defendant." (R., 234 and 235.)

Is there evidence that Petitioner had reasonable ground to believe that these deposits were made in the bank for the purpose of enabling it and other creditors to secure a preference? If Petitioner knew or had reasonable cause to believe that the deposits were made for that purpose, it was its duty to refuse to receive them and to refuse thereafter to act as the bankrupt's banker. For, to receive them with that belief and with that belief to continue to act as the bankrupt's banker, is to make itself a party to a scheme

of fraud. It follows, therefore, that to contend that Petitioner received these deposits with knowledge or notice that they were made for the purpose of effecting an unlawful preference is to contend that it received them with such knowledge that it should thereafter refuse to continue to serve the bankrupt as its banker. *So that the question under present consideration is this: Is there in this record any evidence justifying the conclusion that it was the duty of Petitioner to refuse to continue to act as banker for the bankrupt?* When a banker refuses longer to serve an old customer, upon the ground that it is his purpose to use the bank as an instrument in a scheme of fraud, it should be able to refer to some evidence which has a legitimate and direct tendency to prove this charge. Does the record in this case disclose any such evidence?

Of course, there is such evidence if the knowledge of Directors Tuger and Harrison can be imputed to the Bank. As they obtained this knowledge while acting in an adversary relation to the Bank, the trial court held it could not be imputed. We do not understand that the correctness of this ruling is challenged. But it is contended (see Petitioner's brief opposing application for this writ, pp. 34-36) that the jury were properly permitted to infer that Tuger actually transmitted his knowledge to the other officials of the Bank February 8, 1909, when a line of credit of $6,000 was granted to the bankrupt company (a credit that was never used; R., p. 143). Their argument is, not that there is any evidence indicating that such communication was made (for there was no such evidence—indeed, the evidence is all to the contrary)—but they say: "It is beyond human credibility that that subject was not brought up and fully and fairly discussed." In other words, they ask a judicial tribunal to presume that a party to a scheme of fraud availed himself of the first opportunity to disclose it. It is scarcely necessary to say that precisely the contrary is to be presumed.

Respondent's counsel also invoke the rule that imputes to the principal the prior acquired knowledge of an agent when the latter is acting for the former in some transaction in which that knowledge is material. While we deny that that rule could by any possibility have application to a case of this character, it is quite sufficient to say that neither Tuger nor Harrison acted for the Bank in any of the transactions involved in this case.

Is there any other testimony in this case justifying the conclusion that it was the duty of Petitioner to refuse to continue to act as banker for the bankrupt?

Let us state this testimony as strongly as it can be stated in support of the contention of respondent:

There came to Petitioner notice that the bankrupt was not paying all its indebtedness as it matured; that it was paying drafts with bills of lading attached; that it was paying notes of other bankers; that in two instances it made two payments on one note the same day.

Precisely what inference the Petitioner should have drawn from these circumstances may be difficult to decide, but we submit that it should not have inferred that there existed the fraudulent and unlawful scheme of preference which made it its duty to refuse to continue to be the bankrupt's banker. To contend that the latter inference should be drawn is, of course, to contend that in all similar cases —cases in which a bank has notice of like circumstances— it should refuse longer to act as the banker of an old customer and thereby precipitate a bankruptcy which otherwise would have been avoided.

Is it not clear that such a refusal would be an unjustifiable refusal? Is it not clear that the bank which for such reasons refuses longer to extend its banking facilities to an old customer acts cowardly and suspiciously? In

dealing with such customers a bank is not bound to be, and has no right to be suspicious of their integrity. It should be its aim to help them—not to hinder them. At the first indication of trouble it has no right to desert them but, on the contrary, it should remember that it is its duty to protect them. As the Court from these circumstances could not have inferred that Petitioner had reasonable cause to believe that the payments would effect a preference or that it was chargeable with notice of the fraudulent scheme of the bankrupt's directors, it should not have permitted the jury to draw that inference. It should have applied in this case the principles of the opinion of this court in

Grant vs. National Bank, 97 U. S., p. 80,

and said of this evidence

> "that it falls short of establishing that" Petitioner "had reasonable cause to believe" that the payments made by the debtor would effect a preference.

We therefore insist that the trial court erred in submitting this question to the jury, and the Supreme Court erred in holding that the testimony warranted its submission. If we are right in the contention under present consideration, not only should the judgment be reversed, but, under the practice in Michigan (see Sec. 2 of Act 217 of Public Acts of 1915), the Appellate Court, in correcting the error of the trial court, should enter the judgment which that court should have entered. That is, in this case a final judgment in favor of the defendant should be entered, because there was no evidence from which the jury could infer that the payments in question were made with reasonable cause to believe that a preference would thereby be effected.

ELLIOTT G. STEVENSON,
WILLIAM L. CARPENTER,
Attorneys for Petitioner.

12.

No. 9[redacted]4[redacted]

Office Supreme Court, U. S.
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MAR 17 1917
JAMES D. MAHER
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Supreme Court of the United States

GRATIOT COUNTY STATE BANK,

A Corporation, Petitioner.

vs.

D. LLOYD JOHNSON,

As Trustee of the St. Louis Chemical Company, Bankrupt, Respondent.

BRIEF IN BEHALF OF RESPONDENT.

EDWARD J. MOINET,
EDWIN H. LYON,
WILLIAM A. BAHLKE,
Attorneys for Respondent.

DETROIT:
Record Printing Co., Free Press Building, 11-17 Lafayette Boulevard.
1917.

Supreme Court of the United States

GRATIOT COUNTY STATE BANK,
A CORPORATION,
Petitioner.

vs.

D. LLOYD JOHNSON,
AS TRUSTEE OF THE ST. LOUIS
CHEMICAL COMPANY, BANKRUPT,
Respondent.

Brief in Behalf of Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Michigan.

The petition in this case is addressed to the Court (p. 1) and admits and alleges (p. 7) that,

> "Your petitioner herein has no right of appeal to or writ of error from this Honorable Court."

And the petitioner prays (p. 7) that a Writ of Certiorari be issued to the Supreme Court of the State of Michigan.

The transcript of the record which was served with this petition shows (p. 304) that respondent recovered a money judgment in the lower court; that the cause was submitted to the Supreme Court of the State of Michigan on April 20, 1916 (p. 381); and that the judgment of the lower court was affirmed in the Supreme Court on December 21, 1916 (p. 372).

We call the attention of the Court to the fact that under Section 709 of the U. S. Comp. Sts. 1901, which remains in force, the method of reviewing this judgment of a State Court is by Writ of Error, and that only.

> "A judgment or decree, at law or in equity, of the highest court of a State is reviewable in the Supreme Court by writ of error only."
> *Loveland on Bankruptcy, Vol.* 2, *Sec.* 882.

Citing,

> *Cohens vs. Virginia*, 6 *Wheat*, 264, 410.
> *Verden vs. Coleman*, 22 *How.* 192.

Accordingly, we respectfully urge that the petition for a Writ of Certiorari in this case is not warranted by the practice and that the petition should be denied with costs.

It cannot be said that that portion of the prayer of the petition (p. 7) for "such other or further relief or remedy in the premises as to this Court may seem appropriate" broadens the petition so as to include therein an application for a writ of error, because that language obviously refers to anticipated relief following the allowance of a Writ of Certiorari, and on the same page petitioner disclaims an application for a writ of error because it alleges that (p. 7) "Your petitioner herein has no right of appeal to or writ of error from this Honorable Court."

At the time of serving the petition for a Writ of Certiorari, counsel for petitioner served what purports to be a copy of a motion for a Writ of "certiorari or other proper process" directed to the Supreme Court of the State of Michigan; also a notice that that motion and the petition for Writ of Certiorari will be submitted to this Honorable Court on March 19, 1917. Accordingly, if it be claimed by opposing counsel that if petitioner is not entitled to a Writ of Certiorari, it is at least entitled to a writ of error, we call attention to the rule of practice that an application for a writ of error must be made and submitted to a Justice of this court.

> "The practice is to submit the record of the State court to a Justice of the Supreme Court, whose duty it then is to ascertain upon examination whether the case upon the face of the record will justify the allowance of the writ. He may refer the application to the whole court for decision as to the propriety of the issuance of the writ. The Supreme Court will consider no application for a writ of error, unless a Justice of the court has endorsed on the record a request that the application be made to the full bench."

Foster's Fed. Practice (2nd Ed.), Vol 2, Sec. 477.

Citing,

Twitchell vs. Commonwealth, 7 *Wallace* 321.
Spies vs. Illinois, 123 *U. S.* 131, 143.
In re Kemmler, 136 *U. S.* 436, 437.
In re Ingalls, 139 *U. S.* 548.

In the case last cited, Chief Justice Fuller writing the opinion, this Court uses the following language:

> "We wish it to be distinctly understood that in future no such application (an application to the Court in session for the allowance of a writ of error) will be entertained, except when a Justice of this court, upon consideration of the record, has deemed it proper, under special circumstances, to endorse thereon a request that counsel be permitted to proceed in that way."

Therefore, we respectfully urge that even though the application here can by any charitable construction be considered as an application for a writ of error, it ought, also, to be denied with costs.

If, notwithstanding the foregoing objections to the allowance of any writ upon this application, the Court deems it proper to consider the petition, we call attention to the following as reasons why no writ should be allowed:

The petition in Bankruptcy (Rec. pp. 304-313) was filed in the Northern Division of the Eastern District of Michigan on June 25, 1909 (Rec. p. 10).

That that is the correct date of the filing of the petition appears from the fact that the two affidavits in support of the petition were verified on June 25, 1909 (Rec. pp. 311-313), when taken in connection with the further fact that the subpoena was issued on the same date, (Rec. p. 16).

In that petition the act of bankruptcy upon which an adjudication is prayed is as follows (Rec. pp. 306-7):

> "And your petitioner further represents that said St. Louis Chemical Company, said corporation, is insolvent and that within four months next preceding the date of this petition the said St. Louis Chemical

> Company committed an act of bankruptcy in this that it has heretofore, to-wit: at times and in the manner hereinafter set forth, transferred while insolvent, a portion of its property to one or more of its creditors with the intent to prefer such creditors over its other creditors and in manner as follows:"

and then follows (Rec. pp. 307-310) a statement of various alleged preferential payments commencing on February 26, 1909 (Rec. p. 307) and continuing from time to time until May 11, 1909 (Rec. p. 310).

Among the alleged preferential payments are the payments to the Petitioner herein for which judgment was recovered in the court below (Rec. pp. 7, 307).

The St. Louis Chemical Company filed its answer to that petition, verified by its secretary (Rec. pp. 313-322), and it is to be noted that nowhere in that answer does the Chemical Company deny the allegation of its insolvency during the four months next preceding the date of the petition.

The issue thus joined was duly litigated before the referee in bankruptcy acting as Special Master, and on August 23, 1910, he made and two days later filed his report and finding of facts, addressed to Hon. Henry H. Swan, the Judge of the Eastern District of Michigan (Rec. pp. 322-328).

In that report the Special Master found and reported the following specific facts (Rec. p. 328):

> "On June 25, 1909, when the petition was filed and for four months or more prior thereto, the St. Louis Chemical Company was insolvent and was *known* by *its directors* to be insolvent."
>
> "During such four months' period the corporation paid out the moneys alleged in the petitioning creditors' petition and these payments were preferences within the meaning of the Acts of Congress relating to bankruptcy."

And the reason why the Special Master found that the Chemical Company was insolvent was because the testimony satisfied him that it had only $30,000 of assets and liabilities of upwards of $88,000 (Rec. p. 324).

The petition herein alleges (p. 2) that the bankruptcy petition names eight creditors to whom preferential payments had been made which constituted the acts of bankruptcy for which an adjudication was sought; that Petitioner was named as one of those eight; and that the report of the Special Master does not mention Petitioner but does mention the other seven in his report.

While this question is immaterial here, in our view, yet it is perfectly evident that the Special Master undertook to enumerate *all* of the parties named in the bankruptcy petition as having received preferences, as his language shows (Rec. pp. 322-3), and that the name of the Gratiot County State Bank was inadvertently omitted in that enumeration.

As already stated, the Special Master specifically found (Rec. p. 328) that "During such four months' period the corporation (St. Louis Chemical Company) *paid out the moneys alleged in the petitioning creditors' petition*" and, as stated, this necessarily included and covered the payments made to the Gratiot County State Bank, because such payments are specifically stated in that petition (Rec. p. 307).

On April 26, 1911, Judge Swan signed and filed his order and adjudication (Rec. pp. 329-330) touching said report and stated therein (Rec. p. 329) that

> "* * * it is now here by the Court ordered that said Report and Findings of the Special Master be and the same are hereby confirmed and said Saint Louis Chemical Company of Saint Louis, in the County of Gratiot, in said District, is hereby adjudged and declared bankrupt, accordingly."

The report and findings of the Special Master, and the confirmation of that report and findings and the adjudication by Judge Swan have remained unappealed from and unreversed.

Accordingly, we respectfully submit that the allegation that the St. Louis Chemical Company was insolvent during the four months next prior to June 25, 1909, and during the entire time in which petitioner received the payments in question, became res adjudicata. That single charge of insolvency during that entire four months, and the transfer while so insolvent of a portion of its property, constituted

the sole act or acts of bankruptcy upon which an adjudication in bankruptcy was sought and made.

And it is no answer to the foregoing contention to suggest that the Special Master and the District Judge might have properly based their findings upon a time shorter than four months or upon a lesser number of preferential payments; because the fact remains that they both found that the insolvency existed during the entire four months and that all of the payments made during that time were preferential. Hence, no one can be heard to say that the fact of insolvency and the fact of preferential payments on any given date during that four months was any more or any less adjudicated than were those facts as existing upon any other date during the four months.

In fact, the theory of the petition was that the St. Louis Chemical Company was insolvent during the entire four months, as a single, indivisible proposition; and that it commenced to transfer portions of its property on the first day of that four months, to its creditors with intent to prefer them over its other creditors.

Accordingly, it is apparent that the adjudication of insolvency covered and included the entire four months next before the date of filing the petition, under the rule thus laid down:

> "But where the question of insolvency is adjudged in determining an act of bankruptcy in an involuntary proceeding the fact of insolvency at the date the act was committed may be taken as established by the adjudication."
>
> *Cook vs. Robinson*, 194 *Fed. Rep.* 785, 791.
>
> *Loveland on Bankruptcy*, *Vol.* 1, *p.* 985.

And that the determination of this fact of insolvency during the entire four months next prior to the time of filing the petition possesses finality, is shown by the following authorities:

> "While the jurisdiction of the National Courts is limited, they are not inferior Courts, and their judgments possess every attribute of finality and estoppel which pertains to those of Courts of general jurisdiction."
>
> *In re First Nat. Bank*, 152 *Fed. Rep.* 64, 70.

Citing,

McCormick vs. Sullivant, 10 *Wheat.* 192, 199.
Ex parte Watkins, 3 *Pet.* 193, 207.
Des Moines Nav. & R. Co. vs. Iowa Homestead Co., 123 *U. S.* 552, 557, 559.
Edelstein vs. U. S., 149 *Fed. Rep.* 636.

The petition in this case is based upon two propositions of law, which will be discussed in their order.

The first proposition (Petition, p. 2) raises the question whether the adjudication in bankruptcy was "a conclusive determination *as to all creditors* that the bankrupt was insolvent *for the full period of four months* prior to the filing of the petition in bankruptcy."

If this legal proposition needs to be stated, under the practice in this Court, with anything like the precision of an assignment of error, it does not raise a material question. Petitioner is not at all concerned with the question whether the adjudication of insolvency was a conclusive determination as to *all* creditors of the bankrupt, but is concerned only with the question whether that adjudication was a conclusive determination as to it, and it alone, that the bankrupt was insolvent for four months next prior to the filing of the petition in bankruptcy.

Many reasons will occur to the Court why it might be conclusive as to some creditor or creditors even though it might not be conclusive as to all creditors. Hence, the question raised is not material here, because it is not confined to or necessarily includes, the petitioner who, upon the Record submitted, is concerned only with its own status.

If the Court will kindly refer to page 9 of the Record, it will appear that petitioner as defendant in the trial court pleaded only the general issue. It did not assert "any title, right, privilege or immunity" under any provision of the Bankruptcy Act, and there was no decision in the lower court or in the Supreme Court of the State of Michigan "against the title, right, privilege or immunity specially set up or claimed" by the petitioner. In fact, petitioner was not entitled to raise that question under its plea, under

Michigan Circuit Court Rule 7 (b), in force at the time of joining issue and the trial of this case, which reads as follows:

> "An affirmative defense, * * * and any defense which by other *affirmative matter* seeks to avoid the legal effect of or defeat the cause of action set forth in plaintiff's declaration, must be plainly set forth in a notice added to the defendant's plea."

Plaintiff, upon the trial of that case, naturally and properly relied upon the determination of the bankruptcy court that the St. Louis Chemical Company was insolvent during the four months prior to the date of filing the petition in bankruptcy. If petitioner as defendant claimed the right to litigate that question in that court, it was bound, under the rule quoted, to give notice of that contention in order to enable the plaintiff in that case to prepare to meet that issue. And in the absence of any such notice, the ruling of the trial court and of the Supreme Court of Michigan was correct, in any event.

If this Court passes the objections raised and considers the first proposition of law raised in the petition in this case (p. 2), then we respectfully assert that the finding of facts by the Special Master and its affirmance by Judge Swan, followed by the adjudication upon those specific facts, was conclusive against this petitioner upon the proposition that the St. Louis Chemical Company was insolvent during the four months in question, because during that four months this petitioner was a creditor of the insolvent company holding moneys in violation and in fraud of the provisions of the bankruptcy act. And this proposition is well illustrated by the provision of the bankruptcy act that where a creditor has received a voidable preferential payment which has later become "liquidated by litigation," such creditor, if compelled to repay the moneys received, is allowed 60 days after such liquidation by litigation to prove his claim as a creditor against the bankrupt's estate.

Bankrupt Act, Sec. 57 N.

In other words, the creditor is considered a creditor during the bankruptcy proceedings, but holding or owing moneys belonging to the estate which he is or may be subsequently compelled to repay.

Accordingly, it has been held, as applied to the case at bar, that petitioner was a creditor of the bankrupt during the time of the bankruptcy proceedings, and was so far a party to those proceedings as to be bound by the facts adjudicated by the bankruptcy court.

Bear vs. Chase, 99 *Fed. Rep.* 920, 923-4.
In re Pekin Plow Co., 112 *Fed. Rep.* 308, 309, 310.
In re Am. Brewing Co., 112 *Fed. Rep.* 752, 758.

Citing,

In re Skinner, 97 *Fed. Rep.* 190.
In re Henry Uhlfelder Clothing Co., 98 *Fed. Rep.* 409.
In re McKinley, *Fed. Cas. No.* 864.
Shawhan vs. Wherritt, 7 *How.* 627.
In re Wallace, *Fed. Cas. No.* 17, 094.
In re Banks, *Fed. Cas. No.* 958.
Morse vs. Godfrey, *Fed. Cas. No.* 9, 856.
Rayl vs. Lapham, 27 *Ohio St.* 452.
Lewis vs. Sloan, 68 *N. C.* 557.
Thornton vs. Hogan, 63 *Mo.* 143.
In re Frazier, 117 *Fed. Rep.* 746, 748-9.
In re First Nat. Bank, 152 *Fed. Rep.* 64, 69-70.
Cook vs. Robinson, 194 *Fed. Rep.* 785, 790-1.
Hackney vs. Hargreaves Bros. (*Neb.*), 99 *N. W. Rep.* 675, 678-9.
John Silvey & Co. vs. Tift (*Ga.*), 31 *S. E. Rep.* 748, 750.

In Bear vs. Chase, supra, the Circuit Court of Appeals states the rule as follows at pages 923-4:

> "Upon the adjudication of the bankrupt, all creditors became parties to the bankrupt proceedings by operation of law, and particularly these creditors by whose acts the bankruptcy was caused."

In the same case, at page 926, the Court uses the following language in reference to the relation existing between Federal and State Courts, and in reference to the finality of the decision of the bankruptcy court:

> "As to many matters the two courts have concurrent jurisdiction, and can and should work in the utmost harmony; but as to others, among them the right to determine what are acts of bankruptcy and

> who are bankrupts, the United State District Court's jurisdiction is superior to, and exclusive of, that of the state court, and, as to all questions necessarily involved in such exclusive jurisdiction, the federal, and not the state, courts should proceed and take charge of and administer the bankrupt's estate. Here, to illustrate, the district court declared the attachment proceedings in the state court to be acts of bankruptcy, and null and void, and by reason thereof adjudicated the bankruptcy. This ruling cannot be reviewed or called into question by the state court, and is absolutely conclusive as against all creditors of the bankrupt, until reviewed or reversed in the proper federal tribunal, i. e., this court, and its action is here approved and affirmed."

In In re Pekin Plow Co., supra, the Circuit Court of Appeals uses the following language at pages 309-310:

> "The proceeding in involuntary bankruptcy is a suit between the bankrupt and all his creditors. Section 18, subd. 'b,' of the bankruptcy act, provides that:
>
> "The bankrupt or any creditor may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow."

Subdivision "d" of the same section provides that,

> "if a bankrupt or any of his creditors shall appear within the time limited and controvert the facts alleged in the petition,"

the judge shall hear and determine the issue so made.

Section 59, subd. "g," provides that:

> "A voluntary or involntary petition shall not be dismissed by the petitioner or petitioners, either for want of prosecution or by consent of parties, until after notice to the creditors."
>
> "These and many other provisions of the act evince an unquestionable intent on the part of congress to make all creditors of the bankrupt parties to the proceeding when once instituted. The effect of the institution of such proceeding is to forthwith sequester and appropriate all the property of the bankrupt to

the payment of his debts pro rata and equally. * * *

"From the foregoing provisions of the act, it in our opinion clearly appears that the institution of proceedings in bankruptcy amounts to an effectual sequestration for the benefit of all his creditors of all the property of the bankrupt, including property transferred by the bankrupt, before proceedings were instituted, in fraud of his creditors."

In In re Am. Brewing Co., supra, the Circuit Court of Appeals uses the following language at pages 757-8:

"Supposing it should be held that the adjudication is not conclusive upon all the matters charged in the petition, still it must be conceded to be presumptively true as to all those allegations. If a judgment does not conclude anything even prima facie, it would be of little use to enter one. * * *

But we are of opinion that the decision of the referee was correct, in holding that the adjudication in bankruptcy was binding upon the appellants, and conclusive upon the question of insolvency. The appellants, as well as the brewing company, were essentially parties to the petition. * * * To say now that the judgment is not binding upon the question of insolvency is to run counter to well-established principles of law applicable to judgments. If it were necessary, in order to bind creditors by a judgment in bankruptcy, that they should appear and answer, as they always have a right to do, then an adjudication could be prevented simply by creditors abstaining from appearing in the proceedings. But it is well settled that the proceedings are in a large sense in rem, and are binding whether the bankrupt or creditors appear or not."

In In re Frazier, supra, the Court uses the following language at pages 748-9:

"The moment the petition is filed the proceeding is in rem. It, in legal effect, sequesters all of his property interests for the benefit of all of his creditors, pari passu, as if seized under attachment or a writ of execution. His whole estate passes into custodia legis. Eo instante every creditor of the bankrupt becomes an adversary party in a legal proceeding for the appropriation of the property of the bankrupt,

and stands as a creditor seeking the aid of the court of exclusive jurisdiction. * * *

The moment of the institution of the proceedings in bankruptcy, such creditors, as already stated, by operation of law, became adversary parties."

In In re First Nat. Bank, supra, the Circuit Court of Appeals, in passing upon the question of the finality of the determination of the bankruptcy court that the Widell Company was principally engaged in manufacturing, which fact was essential to the jurisdiction of the court and the validity of the adjudication, uses the following language (pp. 69-70):

"The court had the same jurisdiction to decide the issues between the parties, whether the Widell Company was or was not principally engaged in a manufacturing pursuit. The only difference the determination of that issue made was that if it was so engaged the court should have given judgment for the petitioners, and if it was not thus occupied it should have rendered judgment against them. The jurisdiction and the duty to decide remained in the court, whichever way it was its duty to determine the issue. The jurisdiction of a court is not limited to the power to render correct decisions. It is the power to decide the issues according to its view of the law and the evidence, and its wrong decisions are as conclusive as its right ones. It empowers the court to determine every issue within the scope of its authority, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties, unless reversed by writ of error or appeal or vacated by some direct proceeding. The filing of the petition for the adjudication and the service of the order to show cause upon the Widell Company conferred plenary jurisdiction of this proceeding upon the court below. The power was thereby vested in, and the duty was imposed upon it, to decide whether or not the Widell Company was principally engaged in a manufacturing pursuit, because the determination of that issue was indispensable to the adjudication in bankruptcy. The adjudication is therefore a demonstration that the court below adjudged that the Widell Company was thus engaged, since it could not have lawfully made the adjudication without such a decision. That judgment, therefore, conclusively estops the complaining creditors here and everywhere from

proving the contrary to avoid the adjudication in bankruptcy until the latter is reversed or vacated n some direct proceeding."

In re First Nat. Bank, 152 *Fed. Rep.* 64, 69-70.

Citing,

Dowell vs. Applegate, 14 *Sup. Ct.* 611.
Foltz vs. St. Louis & S. F. R. Co., 60 *Fed.* 317, 319.
Board of Commissioners vs. Platt, 79 *Fed.* 567, 570.

In Cook vs. Robinson, supra, at pages 790-1, the Circuit Court of Appeals lays down the rule as follows:

"Now, the creditors of the bankrupt became parties to the proceeding to have him so adjudged and are precluded by the order of adjudication in so far at least as the adjudication determines the insolvency of the debtor, and that he has committed an act of bankruptcy within four months of the filing of the petition. * * *

"Being parties to the bankruptcy proceedings, it must follow that the creditors are precluded by the adjudication upon such issues as must necessarily be determined in order to pass judgment; otherwise there would be no end to controversy as to these matters, as every creditor would claim the right to be heard by independent suit. As was said in Re American Brewing Co., 112 Fed. 752-758, 50 C. C. A. 517, 523:

"'If it were necessary, in order to bind creditors by a judgment in bankruptcy, that they should appear and answer, as they always have a right to do, then an adjudication could be prevented simply by creditors abstaining from appearing in the proceedings. But it is well settled that the proceedings are in a large sense in rem, and are binding whether the bankrupt or creditors appear or not.'

"And it has been held that the adjudication in bankruptcy, until avoided by direct proceeding, is as binding and conclusive upon the bankrupt and the creditors as much so as a judgment inter parties on due hearing in a court of competent jurisdiction. In re Hecox, 164 Fed. 823-825, 90 C. C. A. 627. See, also, In re First National Bank (C. C. A. 8th Ct.), 150 Fed. 64-70, 81 C. C. A. 260, 11 Ann. Cas. 355."

Precisely the same principle was applied in behalf of a creditor, as follows:

> "The proceeding against the Henry Ulfelder Clothing Company was not one of which creditors were, upon the facts admitted by the pleadings therein, entitled to notice, under subdivision d of section 59 of the bankruptcy act. Any creditor had the right, however, to voluntarily appear and join in the petition, or to be heard in opposition thereto (Bank Act, sec. 59, subd. f), and those not appearing were, in contemplation of law, represented by the bankrupt, and therefore concluded as to all matters directly in issue and determined by the decree. It was held in Candee vs. Lord, 2 N. Y. 269, that a judgment obtained, without fraud or collusion, against a debtor, 'Is, upon all questions affecting the title to his property, conclusive evidence against his creditors to establish (1) the relation of creditor and debtor between the parties to the record, and (2) the amount of the indebtedness.' And in answer to the argument that creditors not parties to the suit in which such judgment was rendered were not in privity with the defendant debtor, and therefore not estopped thereby, the court said:
>
> "'We think otherwise. The law which gave the judgment debtor the unlimited right (when honestly exercised) to contract debts, to settle and adjust their amount, to secure and pay them, made him, to that extent, the representative of all his creditors who should seek the satisfaction of their demands out of his property. So far, at least, they are in privity with, and claim under, their debtor.'
>
> "And, upon precisely the same principle, the decree in the involuntary proceeding against the Henry Ulfelder Clothing Company, which, in legal effect, determined that at the date of the commencement of such proceeding the bankrupt was indebted to the petitioning creditor upon the identical claim now filed with the referee, and for its full amount, because such claim is indivisible, is conclusive upon all other creditors in the administration of the estate of the bankrupt."
>
> *In re Henry Ulfelder Clothing Co.*, 98 *Fed. Rep.* 409, 413.

In Hackney vs. Hargreaves Bros., supra, the rule is stated as follows, at page 678:

"The defendants in the action are not third parties in the sense that they are in no wise connected with the bankruptcy proceedings, because, for the purpose of these controversies, and in determining their liability, they are sought to be charged as creditors of the bankrupt having received unlawful preferences, and for such purpose were necessarily parties to the bankrupt proceedings."

In John Silvey & Co. vs. Tift, supra, the Court uses the following language, at page 750:

"An adjudication in bankruptcy is in the nature of a proceeding in rem, and the adjudication is in the nature of a decree in rem, so far as it fixes the status of the defendant in the proceeding as a bankrupt. Considered in the light of a proceeding in rem, the res involved is the status of the debtor, and the adjudication determines such status to be that of a bankrupt. All persons are bound by the adjudication to that effect; and this was true under the act of 1867 as well as under the act of 1898. If the court rendering the judgment had jurisdiction, such judgment could not be attacked collaterally, but only by a direct proceeding in a competent court, unless it appeared that the decree was void in form, or that due notice was not given. * * *

"There are two kinds of actions which are commonly spoken of as proceedings in rem. The first is a proceeding against the property without suit against its owner, treating the property as if it were the defendant, but with monition or notice giving any person claiming to be the owner an opportunity to appear. In this class of actions, which are strictly in rem, the judgment is against the property alone. The other class of proceedings in rem are proceedings to determine the status of some person or subject-matter. Such are judgments of outlawry, appointments of guardians, administrators, etc., where the proceeding is to determine status, not title to property. The res which make a proceeding in rem is the status, and the determination of status is not a conclusive judgment against third parties as to title. Sometimes a judgment in rem has been defined generally to be an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose."

In the case at bar, the trial court and the Supreme Court of Michigan held only, in this respect, that the adjudication in bankruptcy finally determined the question of insolvency during the period alleged in the petition in bankruptcy, and the trial court submitted to the jury the question whether the Gratiot County State Bank received the money in question with such notice as to make the preference voidable. In fact, as we shall hereinafter point out, the court submitted the case to the jury upon the theory that plaintiff could not recover in this case unless the notice and conduct of the Gratiot County State Bank in receiving the moneys in question were such as to make the bank guilty of bad faith (Rec. pp. 294, 300, 302-3).

At page 2 of the Petition, counsel state that the report of the referee states that the petition (in bankruptcy) "alleges the payment of preferences within four months of the filing of the petition to various parties, these parties so receiving alleged preferences" (Rec. pp. 322 and 323); then follow the names of the seven creditors mentioned in the petition other than the petitioner here.

The foregoing language is incorrect and misleading. The language of the report referred to is as follows (Rec. pp. 322-3):

> "The petition alleges the insolvency of the alleged bankrupt for more than four months prior to the filing of the same, and also alleges the payment of preferences within four months."

As stated, this language was followed by the finding of the Master in Chancery that (Rec. p. 328):

> "During such four months period the corporation paid out the moneys alleged in the petitioning creditors' petition and these payments were preferences within the meaning of the Acts of Congress relating to bankruptcy,"

thereby showing conclusively that the master in chancery found that all of the preferential payments alleged in the petition in bankruptcy were made as therein stated, including the payments to the Gratiot County State Bank.

The four cases cited by counsel for petitioner at pages 9 and 10 of their brief in support of their contention, are either not in point or make for the respondent.

Manson vs. Williams, 213 U. S. 453, is not in point because this court in that case distinctly held that the adjudication against the partnership was not res adjudicata as to Henry Hudson because at that time his property was in the hands of trustees and they were not entitled to be heard in the bankruptcy proceedings.

The case of Tilt vs. Kelsey, 207 U. S. 43, is not in point because in that case this court held that the adjudication of the New Jersey court that Tilt was, at the time of his death, a resident of New Jersey, was not conclusive upon the State of New York, which was a stranger to the proceedings.

The case of In re McCrum, 214 Fed. Rep. 207, is not in point because the decision in that case turned upon the question whether the assignment made by the bankrupt prior to his adjudication was an assignment of all or only a portion of his property, and the adjudication in the bankruptcy court was not definite and conclusive upon that proposition.

The case of John Silvey & Co. vs. Tift (Ga.), 51 S. E. Rep. 748, is in point in favor of our contention in this case, as the portions of the opinion hereinbefore quoted, and other portions of the opinion, readily show.

For these reasons we respectfully submit that even if the first proposition of petitioner properly raises a Federal question, which we deny, there is no merit in it because the trial court held, so far as that first proposition is concerned, that the adjudication in bankruptcy determined the question of insolvency, and submitted the case to the jury upon the question of notice to petitioner and of participation by it in the fraudulent conduct of the bankrupt in making the preferential payments.

The second proposition (p. 4) raises the question whether there was any evidence to be submitted to the jury upon the question whether petitioner had reasonable cause to believe that the payments made to it by the debtor would effect a preference.

In the first place, we call the attention of the court to the fact that in the trial court petitioner (defendant there) insisted that it had the right of off-set, provided for by the bankruptcy act, and that it was protected by the application of the doctrine of set-off.

The trial court submitted the case to the jury, in accordance with requests preferred in behalf of petitioner, upon the question of notice and charged the jury specifically and clearly and in so doing used the following language (Rec. p. 294):

> "But in order to entitle the plaintiff to recover, he must not only show actual insolvency and intent to make preferential payments—the questions that I have just determined for you—but he must show by a preponderance of the evidence that the moneys were received by the defendant bank under such circumstances as charges the bank with bad faith."

Again, referring to the same subject and instructing the jury more specifically as to its duty to determine whether all or any of the payments made to and received by petitioner were received by it in good faith, the Court used the following language (Rec. pp. 300-301):

> "Now, gentlemen of the jury, I think I ought to instruct you in that connection that it does not follow that because you may find for the plaintiff, if you do, that that shall be the entire amount or the exact amount of your verdict, because if you find that any of these amounts were put in the bank at a time when the bank was acting in good faith, if you find such a state of facts as that existed, and then find there came a time when the bank was not acting in good faith and that the other amounts were not received in such a way, then you will readily see that the amounts that were received in good faith would not be charged up to the bank and you would have to make your own computation. If you reach such a time as that and desire any more figures, you may come in and ask for the figures and the dates and all those things, if you desire it at any time."

Again, referring to the same subject, when the jury returned for further instructions and stated in substance that they did not understand the instructions of the Court on the question of their right to return a verdict for all or less than the sum total of all of the preferential payments which were claimed, the Court further instructed the jury (Rec. pp. 302-3):

> "You could not find a greater amount for the plaintiff than that (referring to the amount agreed upon by counsel as the total amount claimed by the

plaintiff). You might find a lesser amount providing you find under the evidence that some of the payments were received in good faith and there came a time afterwards when some of them were received in bad faith. As to whether there is any place to divide that or not, that is for you to say. I don't say that there is or is not. That is a matter of fact for you, but if you find such a state of facts, then you have a right to leave out such payments from your verdict as you find were received in good faith."

Now, in the light of the foregoing excerpts from the charge of the trial court it is perfectly evident that the jury, before it could render a verdict in favor of the plaintiff, had to and did pass upon the question as to whether or not petitioner was acting in bad faith in receiving the payments which were made to it, and necessarily had to find that it acted in bad faith in receiving each and every payment for which judgment was recovered against it in this case.

Under these circumstances, we respectfully submit that in view of the fact that this petitioner has not raised in this court any question as to the propriety of the submission by the trial court of the proposition of its bad faith in the transactions in question, it thereby conclusively admits that it was proper for the Court to submit that question to the jury. And the jury having found against petitioner on that issue, it necessarily follows that petitioner can not in one breath admit that it was properly found guilty of bad faith and in the next breath be heard to say that it was not on notice as required by the bankruptcy statute in order to make it subject to the avoidance of the preferential payments which were made to it.

If, however, the Court deems it proper to further consider the second proposition raised by petitioner, we appreciate the fact that that consideration necessarily involves an examination and consideration of the entire printed record, and in view of the length of that record we herewith submit a somewhat extended statement of and refer to the facts contained in the record for the purpose of demonstrating that beyond peradventure this petitioner "had reasonable cause to believe that the payments made by the debtor would effect a preference." These facts are as follows:

Prior to May 15th, 1907, the St. Louis Chemical Company was a New Jersey corporation, engaged in the manufacture

and sale of certain chemicals, acids, etc., with its principal place of business located at the city of St. Louis, Michigan (pp. 313-314).

At the time of its incorporation in the state of New Jersey said St. Louis Chemical Company executed its bonds in the sum of $100,000 of which $56,000 were sold to various persons and the remaining $44,000 were retained for a time as treasury bonds (p. 314).

On May 16th, 1905, upon the issuance of said bonds the Security Savings Bank and Trust Company, of Toledo, Ohio, was duly appointed trustee thereof and a deed of trust was executed and recorded by the Chemical Company to the trustee covering all of its real estate and nearly all of its personal property (pp. 326-7), which was also placed on file and kept renewed as a chattel mortgage (p. 150).

The trust deed or mortgage in question did not cover, and was not a lien upon, accounts and bills receivable nor upon the cash of the corporation (pp. 326-7).

On May 15th, 1907, the Michigan corporation of the St. Louis Chemical Company was organized, and its property was stated in its Articles of Association as follows: Cash paid in, $30.00; real estate and plant of the New Jersey corporation, $114,759; accounts receivable of the New Jersey corporation, $11,000; good-will of said New Jersey corporation, $229,311 (p. 344).

The Michigan corporation upon its organization assumed all the debts and liabilities of the New Jersey corporation, consisting of the following: Outstanding bonded indebtedness, $56,000 (p. 344); and other outstanding indebtedness "in large sums of money" (p. 316).

Its annual report of December 31st, 1908, showed as appears by the record (p. 345), that the Michigan corporation had a total of nominal assets of $315,526.89 deducting from which the good-will of the company which was carried upon its trial balance ledger at $242,511.12 (p. 168) left nominal assets of $73,015.77, with a total indebtedness (including the bonded indebtedness of $56,000) of $105,705.65 (p. 345).

And in this connection, it is also to be noted that Henry J. Tuger testified, and no one contradicted him, that on December 31st, 1908, the financial condition of the Chemical Com-

pany was substantially the same as it was on February 26th, 1909, because the conditions hadn't changed (p. 167); and that in the bankruptcy proceedings the Referee found (p. 324), and Judge Swan affirmed the finding (p. 329) that on February 28th, 1909, the Chemical Company had total assets of $30,000 and liabilities of upwards of $88,000 (p. 324).

From the time of its organization and down to the time that the corporation ceased operations the Board of Directors consisted of nine persons, viz: W. H. Cocke, D. E. Harrison, Henry J. Tuger, Cass T. Wright, John W. Pfeifler, C. H. LaFlamboy, F. C. Henry, William Hugh and Max Lowenstein (pp. 126-7, 129).

Upon the organization of the Michigan corporation it became necessary to raise money for working capital and the Board of Directors authorized and empowered its officers to make loans where they could (p. 316).

The directors arranged that they should each raise $2,500 of the moneys needed for such working capital (pp. 53, 127).

They raised the money as follows:

Tuger loaned the company $2,500 and took its note for that amount (p. 128), and put that note in the Gratiot County State Bank, and put his own note for a like amount in the same bank, and both notes were renewed from time to time (p. 128).

Harrison and Lowenstein guaranteed the company's note for $5,000 at the Gratiot County State Bank (p. 129).

Henry raised his $2,500 by guaranteeing the company's note for that amount at the Commercial Savings Bank of St. Louis, of which he was director (pp. 53, 130).

Hugh furnished $2,500 and took the company's note for that amount (p. 130).

Wright procured $5,000 for the company by getting his aunt, Mrs. F. N. Wright, to loan that amount to the company and take its note without endorser for that amount (pp. 131, 181, 185).

LaFlamboy was a director of the State Savings Bank of

Stanton and $4,500 was obtained by the company on its note for that amount given to that bank and endorsed by LaFlamboy, Cocke and Pfeifler (pp. 179-180).

The remainder of the money was obtained from the Old National Bank of Grand Rapids, and Cocke, Pfeifler and LaFlamboy endorsed or guaranteed the payment of that paper (p. 132).

Each director of the company saw to it that his proper share was provided for the company, in accordance with the agreement, in some manner (p. 132).

The sources of the moneys so raised were the Gratiot County State Bank, the Commercial Savings Bank of St. Louis, the Old National Bank of Grand Rapids, the Stanton Savings Bank, William Hugh, Henry J. Tuger and Mrs. F. N. Wright (p. 133).

"There came a time when the directors (of the company) had furnished their respective shares which they were to furnish under that arrangement" (p. 133).

And in negotiating these various loans the Chemical Company put up as collateral security the $44,000 of bonds remaining over and above the $56,000 of bonds of the New Jersey corporation (p. 133).

Defendant bank held $9,000 of these bonds as collateral to its note of $5,000 as shown by the undisputed testimony of its assistant cashier, Frank M. Thedgar, as follows (p. 44):

> "Commencing with the note of $5,000 given July 16th, 1907, from that time on down our bank had the guarantee of Max Lowenstein and D. Harrison and eighteen bonds of $500 each as collateral, and all subsequent renewals of it had same collateral and guarantors. Our records showed these facts," etc.

Henry J. Tuger testified, and his testimony is uncontradicted, upon the subject of these bonds, as follows (pp. 149-151):

> "* * * at this time the $44,000 of bonds that were collateral to these notes were regarded the same as the other bonds, as an obligation of the company, that is providing they were sold or became in the

possession of any other person; they were regarded in the hands of the banks to whom they had been pledged as collateral as equally as valid, and equally as well secured by the mortgage as any of the $56,000 of bonds; they certainly were; * * * a portion of these $44,000 bonds were pledged by the New Jersey corporation to the Old National Bank of Grand Rapids to secure the paper of the New Jersey corporation; at the time of the re-organization of the New Jersey corporation into the Michigan corporation I think those bonds were still in the hands of the Old National Bank of Grand Rapids as originally placed there; the obligations of the New Jersey corporation to the Old National Bank were not paid at the time of the re-organization of the new company, and retired, and the bonds remained there, as I understand it; I do not remember how many bonds the Old National Bank held; the amount of the indebtedness of the New Jersey corporation to the Old National Bank was, I think, around $15,000 or $20,000, and I think the amount of the bonds pledged to it were in excess of the amount of indebtedness."

The notes so given by the Chemical Company were renewed from time to time and remained nearly all unpaid in the forepart of 1900 (pp. 133, 62-86).

No one outside of the banks had any guarantor of his paper (p. 101).

In the latter part of 1908 the financial affairs of the company remained in a precarious condition. If its condition did not materially change from that time until February 26th, 1909, and Henry J. Tuger testified without contradiction that it did not (p. 167), then the Chemical Company was insolvent at that time. In any event, its total nominal debt-paying assets exceeded but little the amount of its debts and it could not pay as men ordinarily do.

With its financial condition in this shape, the directors of the Chemical Company considered the situation and agreed upon a course of action. The date of this agreement does not definitely appear, but it was shown to have been about December, 1908, or January, 1909, (pp. 133-4, 183), and it was undoubtedly November 30th, 1908 (pp. 183, 335-6). Mr. Cocke, the President of the company, made a report as to the condition of the company (pp.

182-3), and that "It was going to be difficult to keep the company afloat."

Accordingly, it was arranged that the company was to collect in moneys and pay off these notes endorsed or guaranteed by the directors and retire the bonds collateral thereto (pp. 133-4).

This plan of the company was stated so clearly by Henry J. Tuger, one of its directors and the Vice-President of defendant bank, that we insert his testimony on that point as follows (pp. 134-40):

> "Q. Now, that was the arrangement made by the directors of that company, was it not? A. It was discussed by the members, but no formal action was taken; I understood that they were going to follow out those lines though that is all that I know; that the company was going to pursue that course.
>
> Q. And you understood that it started upon and continued that course, did you not? A. I understood that they would, yes.
>
> Q. And you understood, did you not, that from time to time as you received payments on your note that these other notes secured by these bonds were being taken care of at the same time? A. I didn't know exactly what they paid but I supposed that that was the case. That was my understanding; and that I understood was the course which the company had determined upon to pursue.
>
> Q. And your understanding was, and is, is it not, that whenever the company made these payments in February and March, 1909, upon those notes that we have been referring to as being secured by a part of the stock of $44,000, that those payments were being made by the company for the purpose of paying off and getting rid of those notes, and taking up the bonds collateral thereto? A. Yes, sir.
>
> Q. And it was also your understanding, was it not, that it was the purpose of the company and the intention of the company to pay off those debts as secured by those bonds and then go to the question of paying off the general unsecured creditors? A. Yes, sir.
>
> Q. Was a part of the policy of that company was it not at that time? A. Yes, sir, as I understood it.

Q. And agreed upon by the directors? A. Yes, sir—well, in a way.

Q. In an informal way? A. Yes, sir, no formal agreement at all.

Q. What do you say as to whether or not that was the talk of the directors that they would pursue that course? A. Yes, sir. I mean that it was not in the form of a resolution and placed upon the record of the company, but it was agreed in a verbal way that that should be the policy of the company; there didn't anyone object that I remember of.

Q. And all the directors, as you recollect, consented to it? A. If they were all there; I think they were at the time; I don't remember.

Q. And they aproved of the following of that course, did they not? A. Yes, sir.

Q. And it was in accordance with that arrangement, and that agreement, that the company was to pay off the notes secured by the bonds out of the $44,000 of bonds, that these various payments upon these notes secured by the bonds were made according to your understanding? A. Yes, sir.

Q. And was there any talk there as to how long it would take to pay off those notes secured by those bonds, or how quick they expected to be able to do it? A. I think there was; I cannot remember the talk now. It seems as if the management reported these things from time to time and explained to the board how we could wipe out this indebtedness.

Q. I notice here, by the evidence already in the case, that the Mrs. Wright note didn't get any payment upon it; do you know how that came to be overlooked? A. No, sir.

Q. But the arrangement and policy of the company was to pay such amounts as would keep the payments about proportional upon each of the notes secured by the bonds, taking into consideration the amounts of the notes, was it not? A. I don't remember that anything was said about that.

Q. But to pay them off in the same general way proportionate or otherwise from time to time until you got them retired. A. Yes, sir.

Q. And take up those bonds? A. Yes, sir.

Q. What do you say as to whether or not it was not also talked there that after you got those all retired and all paid off your company would then

take up the problem of paying off the general creditors of the company? A. Yes, sir.

Q. According to the course of your business it was up to the management to refuse payment of claims outside of these secured by the bonds, if anybody did, was it not? A. Yes, sir.

Q. You do know, however, that it was the understanding and agreement of the Board, and the understanding and agreement of the management of the company, that first and foremost they were to pay off and retire those notes secured by these bonds, and then afterward try and take care of the general creditors? A. That was the general understanding; yes, sir.

Q. Was that the general talk? A. It was never talked, but the management proposed that, and it was acceptable to others.

Q. To the directors? A. Yes, sir.

Q. And that was the policy that the company sought to carry out, was it not? A. That was what I understood.

Q. Who was the manager at that time? A. Mr. Cocke was general manager and president.

Q. Whether or not he proposed to the board—said to the board—that it was his idea that the best thing to do was to collect in your assets as quickly as possible, pay off these notes secured by the bonds of the company and retire those bonds? A. I think that was his sugestion; that was the substance of what he suggested to the board.

Q. And you say that the board fell in with that idea, and approved of it? A. There was no objection to it raised. I understood that from that time on the company pursued that policy. I cannot fix the time that that arrangement was made.

Q. In other words your understanding is, that that arrangement was made before the company began to make these payments of January, February and March, upon these notes secured by these bonds? A. Yes, sir.

Q. And your understanding also is, that payments made upon these notes during January, February and March, referring to the notes secured by the bonds, were made in pursuance of, and for the purpose of, carrying out that arrangement of the board of directors? A. Yes, sir."

Following out this plan as thus agreed upon, the company refused to pay its debts as they were presented to it, except its labor and running expenses, its freight bills and certain drafts drawn with bill of lading attached (which it had to pay to get materials necessary to continue business) and collected in its moneys and sold its products and made payments upon the notes endorsed or guaranteed by the directors *save only not a dollar was paid on the Mrs. F. N. Wright note*, although her note was as much secured by a part of the $44,000 of bonds as any of the other notes (pp. 131, 182).

In carrying out this plan payments were distributed among the holders of the notes endorsed or guaranteed by the directors, keeping them in a general way in about equal proportions, and in so doing all payments were made through the defendant bank by checks on the Chemical Company's account in that bank, and among those are the payments in question in this case and for which plaintiff recovered a judgment as preferential payments under the Bankruptcy Act, as follows (pp. 43, 62-83):

$700 on February 26th, 1909.
$200 on March 4th, 1909.
$200 on March 6th, 1909.
$500 on March 12th, 1909.
$200 on March 12th, 1909.
$500 on March 13th, 1909.
$400 on March 13th, 1909.
$200 on March 20th, 1909.
$400 on March 23rd, 1909.
$500 on March 23rd, 1909.
$100 on March 24th, 1909.
$442.39 on March 31st, 1909.

The defendant bank was not only on notice as to the financial condition of the Chemical Company, but the stockholders, officers, business management and business dealings between them were such that no one can escape the conclusion that the bank and its managing officers were parties to the scheme to take care of the directors of the Chemical Company at the expense of Mrs. Wright and the general creditors for whose benefit this action was commenced and is prosecuted.

A. B. Darragh, the president of defendant bank (p. 225), was the owner of 375 shares of stock in the Chemical

Company (pp. 244, 345), besides being the owner of some of its bonds (pp. 333-5).

Henry J. Tuger, the Vice-President of defendant bank (p. 250) and a member of its Board of Directors (p. 126) and its examining committee (p. 239), was the owner of 591½ shares of Chemical Company stock (pp. 345-6), and a director of that company from the time of its organization in 1907 until after the payments in question (p. 126). He was also the owner of $2,500 of the bonds of the company (p. 150).

B. A. Church, cashier of defendant bank (p. 245), and a director therein (pp. 250-1), was the owner of 200 shares of stock in the Chemical Company (p. 345), and his wife was the owner of 50 shares therein (p. 249, 345), and he was looking after his interests in the company (p. 249).

D. E. Harrison, a director of defendant bank (p. 145), was the Vice-President of the Chemical Company (p. 145), and one of the directors from the time of its organization in 1907 until it failed in 1909 (pp. 126-7), and the owner of 1895 shares of its stock (p. 345).

B. A. Church, the cashier of defendant bank, was present at the first stockholders' meeting at the organization of the Chemical Company in 1907 (p. 254), heard the Articles of Incorporation read (p. 254), and those articles showed that $30 was paid in in cash (p. 344) and the good-will of the New Jersey corporation of the same name was put in a $229,211 (p. 344). He attended the stockholders' meeting from time to time (pp. 252-3) and at those meetings the secretary of the company made verbal reports of the financial condition of the company (p. 253).

Henry J. Tuger, Vice-President of defendant bank, and director of the Chemical Company, testified, and no one contradicted him, that if the Chemical Company was insolvent in March, 1909, it was insolvent in December, 1908, as the conditions hadn't changed (p. 167).

Church, Tuger and Harrison, the first two, respectively, cashier and vice-president, and all three directors, of defendant bank, knew of the financial condition of the Chemical Company from its organization in 1907 until it collapsed in 1909.

The Chemical Company being aparently "on its last legs," a meeting of the Board of Directors was held November 30th, 1908, seven of the nine directors being present (p. 148); a verbal report of the financial condition of the company was presented (pp. 148, 335-6); and it is obvious from the record that it was at this meeting that the president of the company, Cocke, reported that it was difficult or impossible to keep the company afloat (p. 183), and the scheme was adopted of paying and retiring the paper of the company of which the directors of the company were either endorsers, guarantors or holders (pp. 133-4).

In accordance with that scheme the following steps were agreed upon and taken:

(a) Notices were at once sent to the holders of the $56,000 of bonds that the company could not meet the interest on its bonds (pp. 335-6), obviously referring to the interest which had come due June 1st and which was to come due on December 1st, 1908 (p. 335).

(b) Those notices contained the statement that the directors of the Chemical Company were, themselves, heavy bondholders (p. 336), and this statement evidently included not only the bonds owned by the directors but also that part of the $44,000 of bonds which they held as security for the moneys which they had raised to furnish working capital for the company.

(c) The company refused to pay its notes, debts and drafts to a large amount drawn on it through the defendant bank as follows:

1908:
December 7th, draft of $16.78 (p. 46).
December 10th, draft of $36.16 (p. 47).
December 17th, draft of $769.55 (p. 47).
December 18th, draft of $87.92 (p. 47).
1909:
January 4th, draft of $420.87 (p. 48).
January 4th, note of $420, dated October 5th, 1908, due 90 days after date, payment refused (p. 51).
January 11th, draft of $316.14 (p. 48).
January 15th, draft of $144.60 (p. 48).
January 25th, draft of $223 (p. 48).
January 27th, draft of $100 (p. 48).
January 27th, draft of $50 (p. 48).

February 18th, not of $550 and interest protested (pp. 48-9).
March 9th, draft of $17.05 (p. 49).
March 9th, draft of $2761.65 (p. 49).
March 20th, draft of $360 (p. 49).
March 20th, draft of $183 (p. 49).
March 22nd, draft of $262.28 (p. 49).

Note of $551.07, dated November 20th, 1908, due March 20th, 1909, with interest, protested at defendant bank (p. 50).

Sight draft of $306, dated March 25th, 1909, returned April 1st, 1909 (p. 50).

Sight draft of $49.64, dated March 24th, 1909, returned March 30th, 1909 (p. 50).

Note due in 60 days given to Harde Brothers Mining Co. for $1247.35. Protested by defendant bank for non-payment and returned (Rec. p. 51),

Note dated November 20th, 1908, given to Peoples' State Bank, Detroit, amount $562.27, due March 20th, 1909, returned March 22nd, 1909 (Rec. p. 49).

Note dated October 5th, 1908, due in 90 days payable at defendant bank returned to the party from whom received (Rec. p. 51).

(d) A considerable number of drafts of large amounts were drawn upon and presented to and paid by the Chemical Company through defendant bank during this period by or through the Cleveland National Bank (pp. 110-11), but it was afterwards shown that these drafts were drawn with bills of lading attached (p. 192-3, 196-8), so that it was necessary to pay the drafts in order to obtain the shipments, which were necessary to convert the company's stock on hand into ready money.

(e) The moneys of the Chemical Company were gotten together in accordance with the plan agreed upon and placed in the Gratiot County State Bank for the purpose, and payments made upon the paper guaranteed or held by the directors as follows (pp. 62-86):

1909:

February 26th,	$700, Gratiot County State Bank (p. 62).
	$1,000, Old National Bank of Grand Rapids (pp. 52, 62).
	$200, Henry J. Tuger (p. 62).
March 4th,	$200, Gratiot County State Bank (p. 62).
March 5th,	$100, Henry J. Tuger (p. 62).
March 6th,	$200, Gratiot County State Bank (pp. 68-9).
March 8th,	$200, Henry J. Tuger (p. 69).
	$300, Commercial Savings Bank (p. 70).
March 12th,	$81.67, State Savings Bank, Stanton (pp. 71, 74-5).
	$500, Gratiot County State Bank (p. 85).
	$400, Commercial Savings Bank (p. 75).
	$200, Henry J. Tuger (p. 76).
	$200, Gratiot County State Bank (p. 76).
	$227.36, LaFlamboy (p. 77).
March 13th,	$500, Gratiot County State Bank (p. 77).
	$500, State Savings Bank, Stanton (p. 78).
	$300, Henry J. Tuger (p. 79).
March 15th,	$400, Gratiot County State Bank (p. 80).
	$600, State Savings Bank, Stanton (p. 80).
	$300, Henry J. Tuger (p. 80).
	$400, Commercial Savings Bank (pp. 80-1).
March 20th,	$300, State Savings Bank, Stanton (pp. 81-2).
	$200, Gratiot County State Bank (p. 82).
March 23rd,	$500, Gratiot County State Bank (p. 82).
	$400, Gratiot County State Bank (pp. 82-3).
March 23rd,	$100, Gratiot County State Bank (p. 83).
March 31st,	$442.39, Gratiot County State Bank (p. 83).
April 10th,	$250, State Savings Bank, Stanton (p. 83).
April 23rd,	$300, State Savings Bank, Stanton (pp. 84-5).
May 1st,	$305.12, State Savings Bank, Stanton (p. 85).

1909:

May 3rd,	$500, William Hugh (p. 85).
May 11th.	$400, William Hugh (p. 86).

(f) The foregoing payments were made by checks drawn upon the Gratiot County State Bank and the checks were produced, identified and offered in evidence upon the trial (pp. 62-85).

Frank M. Thedgar, the assistant cashier of the defendant

bank, knew of these various payments at the time and testified in that respect, as follows (p. 51):

> "I think that about February 26th, 1909, the Chemical Company commenced paying other banks that held its paper by checks drawn upon its account at our bank. I knew of that at the time."

The record shows that during the time the preferential payments were being made to the Petitioner, it was not only returning collections and claims against the St. Louis Chemical Company in large numbers and amounts but actually protesting notes for non-payment by that company and turning its unpaid obligations over to local attorneys for forced collection. (Rec. pp. 46, 47, 48, 49).

The Petitioner actually held in its bank for collection two notes of $15.00 each given by that company to Fred Biddlecomb, a local resident of the City of St. Louis (where it did business), from on or about December 28, 1908, to July 28, 1909, when the notes were returned to the owner as uncollected. It is to be noted that it was during this time that the Petitioner actually received from bankrupt the payment of the preferences recovered in this case. (Rec. pp. 267-8).

As we have hereinbefore pointed out, B. A. Church, the cashier of defendant bank, was present at the birth of the corporation, knew that its financial statement was inflated from the beginning by upwards of $229,000 under the guise of "good-will of the New Jersey corporation" in order to give the company a respectable financial appearance, was present at various meetings of the stockholders of the corporation and heard the financial affairs of the company reported and discussed, and naturally and necessarily knew that its financial death was imminent.

Frank M. Thedgar, the assistant cashier of defendant bank, knew and was bound to know that the Chemical Company was refusing to pay large amounts of its debts due to general creditors, turning down drafts drawn on it through defendant bank and allowing its paper to go to protest, while it was paying the paper guaranteed or held by the directors. He says in that respect (p. 51):

> "I think that about February 26th, 1909, the Chemical Company commenced paying other banks that

held its paper by checks drawn upon its account at our bank. I knew of that at the time."

Thedgar also knew that while the payments were being made by the Chemical Company upon the note held by defendant bank (pp. 97-8), the bank held a note of $2,500 against Tuger and that Tuger held a note for the like amount against the Chemical Company and that as fast as payments were made upon Tuger's note against the company he, in turn, applied those payments upon the note which the bank held against him (pp. 98-9). And he also knew at the same time that payments were being made in like manner upon the note of the Chemical Company held by the State Savings Bank of Stanton (p. 100).

In other words, he knew that this paper held by the bank was being taken care of while the debts of the general creditors were being refused from day to day.

Thedgar and the cashier of the bank were bound to know that when the Chemical Company had owed it $5,000 which it renewed from time to time for nearly two years without having paid a dollar thereon, and was repudiating payment of interest on its bonds, and in such a feverish haste to pay off its debt to defendant bank that upon three different occasions it made two payments in one day (p. 43), there was something rotten in the State of Denmark.

When Thedgar was asked whether it was according to the business of the Chemical Company to make two payments upon one note upon the same day he gave the evasive answer (p. 76):

"Well, that is a hard question for me to answer."

But Henry J. Tuger, experienced banker and business man that he is, met the question more frankly, as follows (pp. 171, 178):

"Q. According to your experience as a banker and business man and according to your observation such manner of payment was entirely out of the ordinary, were they not? A. Yes, it might have been out of the ordinary.

Q. Would you regard the making of two payments in one day as unusual? A. Why, I don't know; I suppose it would be unusual."

Henry J. Tuger, the vice-president of defendant bank, was present at the inception of the plan of the Chemical Company to make preferential payments upon the notes guaranteed and held by the directors of that company and knew that it was being carried out as agreed upon. He knew and was bound to know that the Chemical Company was at that time insolvent, as determined by the adjudication of the Federal Court (p. 328).

The testimony is undisputed that A. B. Darragh, the president of defendant bank, left for Washington early in December, 1908, so as to be there on the first Monday in December and was away until about the 6th of March and after that went to St. Louis (p. 227). And the testimony also shows that during that time Henry J. Tuger was the vice-president of defendant bank and in the absence of Mr. Darragh looked after the interests of the bank as president more or less.

> "He performed the duties of president during the absence of Mr. Darragh when occasion arose" (p. 250).

While Henry J. Tuger was thus acting as president of the bank at a time previous to any of the payments in controversy in this case, on February 8th, 1909, at a regular meeting of the board of directors of defendant bank there were present Directors Tuger, Harrison and Church. Vice-President Tuger presided at that meeting (pp. 233, 236).

It also appears that at the meeting of the directors of defendant bank on January 23rd, 1909, Mr. Tuger was elected vice-president of the bank (p. 240).

Now, at the meeting of February 8th, 1909, a line of credit of $6,000 was granted to the St. Louis Chemical Company (p. 233). Whether it be shown by specific facts or not that at that meeting nothing was said or discussed concerning the financial condition of the Chemical Company, it is beyond human credibility that that subject was not brought up and fully and fairly discussed. If it was discussed each and every one of those three men, acting as officials of defendant bank, had sufficient information concerning the financial career and condition of the Chemical Compay then present in their minds to enable them to agree without discussion that its financial affairs were hopeless. If they did not discuss its affairs at that time, which is im-

possible, it was because each and all knew that its affairs were hopeless and they did not want to dwell upon so painful a subject. In any event, they were not then and there acting in a capacity adversary to the bank and the motion touching a line of credit to the Chemical Company was simply and solely to comply with the requirements of the banking law, because they were then carrying the $5,000 note of that company. But, as stated, it is beyond human credibility to say that those three men each and all did not then and there have in mind the financial condition of the Chemical Company and did not then and there discuss that subject.

These men, at those meetings of January 23rd and Febru-8th were in no sense acting in an adversary capacity to the defendant bank, and whatever knowledge and whatever notice they had previously acquired in reference to the financial condition of the Chemical Company then and there became the knowledge of and notice to the defendant bank under the well-settled rule.

Mechem, Agency, Secs. 719, 721.
5 *Cyc.* 461.
Am. & Eng. Encyc of Law (*2nd Ed.*) *Vol* 1, *pp.* 1145-6.
Holden vs. N. Y. and Erie Bank, 72 *N. Y.* 286, 292.
First Nat. Bank vs. Erickson (*Neb.*), 31 *N. W. Rep.* 387, 390.
Gunster vs. Scranton Illuminating, etc. Co. (*Pa.*), 59 *Am. St. Rep.* 650, 659.

"When a bank officer is acting as a president or director of another concern, or as a trustee or executor of an estate, the knowledge acquired in the latter capacity is imputed to his bank according to the most general rule."
5 *Cyc.* 461.

"It is the rule, that the knowledge of the agent is the knowledge of his principal, and notice to the agent of the existence of material facts is notice thereof to the principal, who is taken to know everything about a transaction which his agent in it knows. This rule is sometimes stated, so as to limit it to notice arising from, or at the time connected with, the subject-matter of his agency. Such notice must have come to the agent, it is said, while he is concerned for the principal, and in the course of every transaction, or

so near before it that the agent must be presumed to recollect it. This limitation, however, applies more particularly to the case of an agent whose employment is shortlived, so that the principal shall not be affected by knowledge that came to the agent before his employment began, nor after it was terminated. But where the agency is continuous, and concerned with a business made up of a long series of transactions of a like nature, of the same general character it will be held that knowledge acquired as agent in that business in any one or more of the transactions, making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those transactions in which that agent is engaged, in which that knowledge is material."

Holden vs. New York and Erie Bank et al., 72 *N. Y.* 286, 292.

"The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority, or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it: Provided, however, that such notice or knowledge will not be imputed (1) where it is such as it is the agent's duty not to disclose, and (2) where the agent's relations to the subject-matter, or his previous conduct, render it certain that he will not disclose it, and (3) where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal."

Mechem, Agency, Sec. 721.

In short, this defendant was on notice as to the financial condition and scheme of the Chemical Company to take care of its directors at the expense of its general unsecured creditors, unless it be said that its directors were acting adversely to the bank. And in that connection, it is respectfully insisted that every act of Vice-President Tuger and Director Harrison, while acting as officers of the Chemical Company, were in behalf of and not against the defendant bank. It is true they were undertaking to take care of themselves at the same time that they were taking care of their

bank; but that showed merely a common interest and not an adversary relation.

Defendant bank was, as we have shown, claiming to be secured and was, perhaps or probably, secured by the bonds of the Chemical Company; whether it was so secured or not it was amply secured by the written guaranty of David E. Harrison and Max Lowenstein so that this case does not involve a question of loss by the defendant bank even if this judgment is affirmed and it has to pay it, but it involves simply and solely the question whether this bank, amply secured, shall be permitted to be used as a tool to help out the directors of the Chemical Company who are liable as guarantors to the bank, to the detriment of the creditors of the Chemical Company.

For the foregoing reasons we respectfully submit that the prayer of the petition and also the motion should be denied with costs.

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13.

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No. 9[redacted]148

Supreme Court of the United States

GRATIOT COUNTY STATE BANK,
A Corporation, Petitioner.

vs.

D. LLOYD JOHNSON,
As Trustee of the St. Louis Chemical Company, Bankrupt, Respondent.

SUPPLEMENTAL BRIEF IN BEHALF OF RESPONDENT.

EDWARD J. MOINET,
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SUPREME COURT OF THE UNITED STATES

GRATIOT COUNTY STATE BANK,
A Corporation, Petitioner.

vs.

D. LLOYD JOHNSON,
As Trustee of the St. Louis Chemical Company, Bankrupt, *Respondent.*

SUPPLEMENTAL BRIEF IN BEHALF OF RESPONDENT.

When the original brief of Respondent was prepared herein, counsel did not have before them the amendment to the Judicial Code, which is entitled in part "further to define the jurisdiction" of the Supreme Court, (Public, No. 258, 64th Congress, approved, September 6, 1916). Neither did counsel know of its existence.

Section 237 of the Judicial Code as thereby amended repealed the right to review in this Court by writ of error a final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or im-

munity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority * * *."

The amendment, however, adds the provision, that "it shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause * * *, where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the "decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."

The section as amended by the Act of 1916, governs or controls the application of the petitioner herein, since said act took effect thirty days after its approval or October sixth, 1916. It was therefore in effect before the judgment of the Michigan Supreme Court was entered, which date was December 21st, 1916, (p. 372).

The 1916 amendment to Section 237 of the Judicial Code, restricted or abridged the right of review by writ of error in this court by the elimination of the provision first quoted; it broadened or conferred the power on this court on "certiorari or otherwise" to require that there be certified to it for review and determination, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had in certain cases specified, which includes cases of the character or description arising under federal statutes and as set forth in the petition of the petitioner in the instant application.

The purpose of the amendment of September 6, 1916,

was evidently to prevent the abuses which arose by dilatory and vexatious applications to this court by raising imaginary or possible federal questions under the provision thus stricken from Section 237 of the Judicial Code, without depriving this court of jurisdiction to review in meritorious cases by "certiorari or otherwise," judgments of the highest courts of the States, where is drawn in question as is sought in this case, any "title, right, privilege or immunity" claimed under any statute of the United States, "and the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed, by either party" under such statute.

We understand that where appeals are allowed by "certiorari or otherwise" under the second paragraph or subdivision of Section 237 as amended, and certified to this court for review, the allowance of the appeal is not a matter of right to review the decision of the State court, even though a federal question is involved, but is discretionary and to be granted only in extraordinary cases that may arise.

The two questions raised by petitioner in its application for writ of certiorari herein, arise, only, if at all, as rights claimed under a statute of the United States and may be faily states as follows:

The first assignment reaches the question of the competency of testimony in the trial court.

The second assignment raises the question of whether there was any evidence in the trial court to take the case to the jury upon the question: Did the defendant have reasonable cause to believe, that a preference was intended by the bankrupt in its making the voidable preferential payments in question?

We respectfully submit that such questions are not re-

viewable or within contemplation of the statute since the amendment approved September 6, 1916.

This application is clearly within the evils sought to be remedied by said amendment. To permit a review in this Court upon such questions under the present statute, would make applications to the Court for review by "certiorari or otherwise," under the second paragraph of Section 237 as thus amended, equally as common and often as frivolous and pretentious as applications for writ of error under Section 237 before its recent amendment. Nothing will have been accomplished by the amendment of 1916, if applications such as that of the petitioner in this case, may be granted.

Respectfully submitted,

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Attorneys for Respondent.

GRATIOT COUNTY STATE BANK *v.* JOHNSON, AS TRUSTEE OF THE ST. LOUIS CHEMICAL COMPANY, BANKRUPT.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 148. Submitted January 20, 1919.—Decided March 17, 1919.

Although an adjudication of bankruptcy concludes all the world as to the status of the debtor *qua* bankrupt, it does not bind strangers as to the facts or subsidiary questions of law upon which it is based. P. 248.

In a suit by the trustee to recover, as illegal preferences, payments made by the bankrupt, within four months before the filing of the

involuntary petition, to a creditor who did not appear in the bankruptcy proceedings, the adjudication of bankruptcy is not conclusive evidence of the bankrupt's insolvency when such payments were made, even if based upon allegations and findings that the bankrupt was insolvent throughout the four months and that, during that period, he gave illegal preferences to such creditor, among others. *Id.*

Sections 18*b* and 59*f* of the Bankruptcy Act, allowing creditors to intervene, are permissive only; and, unless a creditor exercises the right, he remains a stranger to the proceedings. P. 249.

The purpose of Congress in expressly authorizing such interventions in involuntary bankruptcy proceedings was to guard against improvident adjudications and protect those creditors whose peculiar interests might be prejudiced by establishing the status of bankruptcy. P. 250.

193 Michigan, 452, reversed.

THE case is stated in the opinion.

Mr. Elliott G. Stevenson and *Mr. William L. Carpenter* for petitioner.

Mr. Edward J. Moinet and *Mr. William A. Bahlke* for respondent. *Mr. Edwin H. Lyon* was on the briefs.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The trustee in bankruptcy of the St. Louis Chemical Company brought suit in a state court of Michigan against the Gratiot County State Bank to recover, as illegal preferences, payments made to it within four months before the filing of the involuntary petition. The Bank denied the allegation that the Chemical Company was insolvent when the payments were made. To establish that fact, the Trustee offered in evidence the adjudication together with the petition on which it was based and the special master's report which it confirmed. The latter found

that the debtor had been insolvent for four months or more before the filing of the petition and had made, while so insolvent, certain preferences. The Bank was not actually a party to the bankruptcy proceedings and had taken no part therein. The trial court held that this evidence was not only admissible but established conclusively that the debtor was insolvent throughout the four months; and it entered judgment for the Trustee which was affirmed by the Supreme Court of Michigan (193 Michigan, 452). The case comes here on writ of certiorari (243 U. S. 645). The only question presented is whether the state courts erred in holding that the record of the adjudication made the fact of insolvency at the time of the payments *res judicata* as against the Bank.

First. The Trustee contends that adjudication in bankruptcy, being in the nature of a judgment *in rem*, establishes not only the status of the debtor as a bankrupt, but also the essential findings of fact on which that judgment was based. The adjudication is, for the purpose of administering the debtor's property, that is, in its legislative effect, conclusive upon all the world. Compare *Shawhan* v. *Wherritt*, 7 How. 627, 643. So far as it declares the status of the debtor, even strangers to the decree may not attack it collaterally. *Michaels* v. *Post*, 21 Wall. 398, 428; *New Lamp Chimney Co.* v. *Ansonia Brass & Copper Co.*, 91 U. S. 656, 661–662. Compare *Hebert* v. *Crawford*, 228 U. S. 204, 208–209. But an adjudication in bankruptcy, like other judgments *in rem*, is not *res judicata* as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto. *Manson* v. *Williams*, 213 U. S. 453, 455.[1] This court applied the

[1] See also *In re Henry Ulfelder Clothing Co.*, 98 Fed. Rep. 409, 413–414; *In re Schick*, 2 Ben. 5, Fed. Cas. No. 12,455; *Silvey & Co.* v. *Tift*, 123 Ga. 804; *Durant* v. *Abendroth*, 97 N. Y. 132; *Lewis* v. *Sloan*, 68 N. C. 557, 562–563.

principle in *Wood* v. *Davis*, 7 Cranch, 271, where a judgment that a mulatto woman was born free was held, as between strangers, not conclusive that her children were free. The rule finds abundant illustration in cases dealing with decedents' estates, *Tilt* v. *Kelsey*, 207 U. S. 43, 52; *Brigham* v. *Fayerweather*, 140 Massachusetts, 411; and in cases involving the marriage status, *Luke* v. *Hill*, 137 Georgia, 159; *Burlen* v. *Shannon*, 3 Gray, 387; *Wilson* v. *Mitchell*, 48 Colorado, 454, 469; *Corry* v. *Lackey*, 105 Michigan, 363; *Belknap* v. *Stewart*, 38 Nebraska, 304; *Gill* v. *Read*, 5 R. I. 343.

Second. The Trustee contends, however, that since by §§ 18*b* and 59*f* [1] of the Bankruptcy Act, any creditor is entitled to intervene in the bankruptcy proceedings, the Bank should be considered a party thereto. These sections are permissive, not mandatory. They give to a creditor, who fears that he will be prejudiced by an adjudication of bankruptcy, the right to contest the petition. Whether he does so or not, he will be bound, like the rest of the world, by the judgment, so far as it is strictly an adjudication of bankruptcy. But he is under no obligation to intervene, and the existence of the right is not equivalent to actual intervention. Unless he exercises the right to become a party, he remains a stranger to the litigation and, as such, unaffected by the decision of even essential subsidiary issues. *In re McCrum*, 214 Fed. Rep. 207, 213; *Cullinane* v. *Bank*, 123 Iowa, 340, 342. The rule is general that persons who might have

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[1] Act of July 1, 1898, c. 541, 30 Stat. 544.

Section 18*b* provides: "The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow." (As amended by the Act of February 5, 1903, c. 487, § 6, 32 Stat. 797, 798.)

Section 59*f* provides: "Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

made themselves parties to a litigation between strangers, but did not, are not bound by the judgment.[1] Compare *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 115. No good reason exists for making an exception in the case of bankruptcy proceedings.

The purpose of Congress in expressly authorizing creditors, as well as the debtor, to answer an involuntary petition in bankruptcy was to guard against an improvident adjudication and to protect those whose peculiar interests might be prejudiced by establishing the status of bankruptcy. See *Blackstone* v. *Everybody's Store*, 207 Fed. Rep. 752, 756; *Jackson* v. *Wauchula Mfg. & Timber Co.*, 230 Fed. Rep. 409, 411. The grant of this right of intervention was harmonized with the general purpose of Congress to secure a prompt adjudication, by requiring that the appearance and answers of creditors be made within five days after the return day on the petition. Had the adjudication been made determinative also of claims of the several creditors against the estate or of claims of the estate against individual creditors, such expedition in proceedings would be impossible, if each of the many widely scattered creditors is to be afforded a fair opportunity to be heard. Furthermore, to require every creditor to acquaint himself with the issues raised in every proceeding in bankruptcy against his debtors, in order to determine whether a decision on any such issue might conceivably affect his interests; and, if so, either to participate in the litigation, or, at his peril, suffer the decision of every question therein litigated to become *res judicata* as against him, would be an intolerable hardship upon creditors. And the resulting volume of litigation would often so delay the adjudication as to defeat the purposes of the Bankruptcy Act.

[1] *Lee* v. *School District*, 149 Iowa, 345, 354; *Weber* v. *Mick*, 131 Ill. 520, 529; *State* v. *Johnson*, 123 Mo. 43, 55; *Hickox* v. *Eastman*, 21 S. D. 591, 595; *Carney* v. *Emmons*, 9 Wis. 114, 117.

The unreasonableness of the rule contended for by the Trustee is well illustrated in cases of alleged fraudulent preference. The claim may be made in respect to any creditor paid off within four months of the filing of an involuntary petition, that he received a fraudulent preference. Is every such former creditor to be deemed an existing creditor within the meaning of §§ 18*b* and 59*f* and a party to the bankruptcy proceeding? Compare *Keppel* v. *Tiffin Savings Bank*, 197 U. S. 356. And shall the decision of the bankruptcy court be binding on all these former creditors in respect to individual claims, although that court could not (without consent) obtain jurisdiction of any creditor who is not a resident of the district in which it sits, *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 311; and would not (prior to the Act of February 5, 1903, c. 487, §§ 8 & 13, 32 Stat. 797, 798, 800) have had jurisdiction, even as against a resident creditor, of a claim to recover a fraudulent preference; such claim being enforceable (without consent) only in courts of general jurisdiction; *Bardes* v. *Hawarden Bank*, 178 U. S. 524; *Wall* v. *Cox*, 181 U. S. 244; *Jaquith* v. *Rowley*, 188 U. S. 620; and, even now, only by plenary suit, *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18; *Babbitt* v. *Dutcher*, 216 U. S. 102, 113.

The decisions of the lower federal courts upon which the state court relied [1] in holding that §§ 18*b* and 59*f* made all creditors parties to the proceeding so as to render

[1] *Cook* v. *Robinson*, 194 Fed. Rep. 785; *In re American Brewing Co.*, 112 Fed. Rep. 752; *Bear* v. *Chase*, 99 Fed. Rep. 920. See also *Lazarus* v. *Eagen*, 206 Fed. Rep. 518. *In re Hecox*, 164 Fed. Rep. 823, also relied upon, is a case of a different character. There, as in *Shawhan* v. *Wherritt*, 7 How, 627, 643, one not actually a party to the proceeding sought to attack the legislative effect of the adjudication—and it was properly held to be conclusive. *Hackney* v. *Hargreaves Bros.* (*Hackney* v. *Raymond Bros. Clarke Co.*), 68 Neb. 633, 639, involved only the admissibility of the schedule of liabilities as evidence tending to prove insolvency.

the adjudication binding on them as to all essential issues, clearly misconceived the intention of Congress. The allegation in the involuntary petition that the Bank was among those who had received preferences, did not impose upon it the duty to appear and answer; and since it did not do so, even a finding to that effect by the bankruptcy court would not have bound it. The Supreme Court of Michigan erred in holding that the adjudication in bankruptcy established conclusively as against the Bank that the debtor was insolvent at the time the payments were made. We have no occasion to consider whether the record introduced was admissible merely as evidence of insolvency.

Reversed.